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March 12, 2012

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35504, *Union Pacific Railroad Company – Petition for Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above-reference matter are an original and ten copies of the Reply Argument and Evidence of Union Pacific Railroad Company. Also enclosed is an electronic copy of the filing on a compact disc.

An additional copy of the filing is enclosed. Please date stamp the additional copy and return it to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER

REPLY ARGUMENT AND EVIDENCE OF UNION PACIFIC RAILROAD COMPANY

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March 12, 2012

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

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PETITION OF UNION PACIFIC RAILROAD COMPANY
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REPLY ARGUMENT AND EVIDENCE OF
UNION PACIFIC RAILROAD COMPANY

The opening evidence and argument of Union Pacific Railroad Company ("UP") explained the significance of the tariff provisions at issue in this proceeding and why they are reasonable terms for rail transportation of toxic by inhalation hazardous commodities ("TIH"). Among other things, UP explained that the tariff provisions should cause shippers to focus more on the risks inherent in TIH transportation, which will make them more likely to take appropriate precautions when their actions affect the level of risk, to incorporate risk into prices they charge end users, and to consider alternatives to long-distance transportation of TIH. In sum, the provisions should cause shippers and receivers to make decisions that more accurately reflect the true costs of transporting TIH, which will lead to a more socially desirable volume of TIH transportation.

In their opening comments, TIH shippers and shipper organizations argue that the tariff provisions – which allocate liability between UP and shippers and require a TIH shipper to indemnify UP for those liabilities arising from carriage of TIH that are not due to UP's fault – are unreasonable. However, they offer no evidence to support this conclusion, and their arguments are not persuasive.

The shipper parties' primary argument is that it is unreasonable to require a TIH shipper to pay for liabilities that did not arise from its own negligence. But the tariff provisions do not require a shipper to indemnify UP for liabilities arising from UP's own negligence, so the shippers' concern involves those liabilities that are not caused by either party's negligence and yet are imposed on UP. TIH materials are among the most dangerous cargoes transported by rail, and the effects of a TIH release are unique to these products. The shipper parties never explain why it is unreasonable to place responsibility for TIH-related liabilities that are not caused by either party's negligence on the TIH shipper (which controls whether and where to move TIH) rather than on UP (which has no choice but to haul the TIH tendered by shippers).

Recognizing the weakness of their arguments on the merits, several shippers also argue that the Board should reverse its decision to institute this proceeding and decline to address the reasonableness of UP's tariff provisions. Contrary to their arguments, a Board ruling on the provisions will resolve uncertainty for UP and shippers, and the Board should therefore exercise its jurisdiction to decide the reasonableness of the provisions. The Board should reject the shippers' objections and declare that the tariff provisions are reasonable.

Part I of the argument below replies to arguments that the Board should refrain from issuing a decision in this proceeding. Part II responds to assertions that two shipper organizations did not address the tariff's provisions for indemnity of third-party liability in dismissing a prior lawsuit filed against UP. Part III counters criticisms that the tariff language is unclear, and Part IV explains that complaints about the provisions reflect misunderstandings of how indemnities work in the real world. Part V addresses arguments that the provisions are not "fair" to shippers, and Part VI responds to various claims that the provisions are contrary to

public policy. Finally, Part VII summarizes why the tariff provisions are a reasonable response to valid concerns and further the national rail transportation policy.

UP is also submitting the attached Reply Verified Statement of Warren B. Beach ("Beach R.V.S."), which addresses a variety of shipper arguments relating to UP's insurance coverage.

I. THE BOARD SHOULD DETERMINE THE REASONABLENESS OF THE TARIFF PROVISIONS.

In its order commencing this proceeding, the Board concluded that issuance of a declaratory order was appropriate because it would resolve uncertainty about the reasonableness of the tariff provisions.[1] The shipper organizations, who call themselves the "Interested Parties," take issue with that conclusion, arguing that the Board should not proceed any further. (Joint Opening Comments of the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, and the National Industrial Transportation League ("Interested Parties Op.") at 2-5.) Their arguments are without merit.

The Interested Parties do not attempt to assert that the Board lacks jurisdiction. As explained in UP's opening evidence, the Board plainly has jurisdiction to address the reasonableness of tariff terms allocating liability for losses associated with transporting TIH. (UP Op. at 10-11.) The Interested Parties argue instead that UP is seeking a ruling on abstract

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[1] *Union Pac. R.R. – Petition for Declaratory Order*, FD 35504 (STB served Dec. 12, 2011) at 3 ("December 12 Order").

principles, rather than concrete tariff terms, and that a Board decision that the provisions are reasonable would not remove uncertainty.[2] They are incorrect on both counts.

A. The Tariff Provisions Are Concrete Terms that Address Real Concerns.

The Interested Parties' suggestion that UP is seeking a ruling on abstract concepts is frivolous. This proceeding does not involve a "strawman" – UP is moving TIH traffic under tariffs subject to the provisions at issue. UP asked the Board to institute this proceeding because a shipper threatened to commence litigation over UP's ability to include the provisions at issue in a common carrier tariff. As described in the Verified Statement of Diane Duren, filed with UP's opening evidence, UP issued the first version of the provisions in response to a TIH shipper's request for common carrier rates and terms. UP subsequently revised the provisions when a complaint filed by shipper organizations revealed that there was confusion about UP's intent. UP has since made other revisions in response to the reactions of shippers during contract negotiations. As described in Ms. Duren's statement, over half of UP's TIH business is now subject to the basic liability allocation approach embodied in the indemnity terms at issue here, including three shippers moving TIH materials subject to the precise tariff provisions at issue. Thus, UP's petition does not request a ruling on abstract principles.

Moreover, the tariff provisions address concrete concerns. As UP explained in its opening evidence, its obligation to carry TIH exposes it to potential catastrophic liability, and even smaller TIH accidents and incidents (such as a release of chlorine in a rail yard due to a receiver's failure to secure a valve after unloading a tank car) can be costly to UP. Among other

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[2] Other shippers also argue that a Board ruling in favor of UP would increase uncertainty. *See* Opening Argument and Evidence of Olin Corporation ("Olin Op.") at 18-19; Opening Comments of Occidental Chemical Corporation ("Occidental Op.") at 6.

things, UP must absorb substantial losses from TIH accidents under its high level of self-insurance.[3] Moreover, such smaller claims can shrink UP's commercial liability insurance coverage by using up the policy limits and can increase UP's costs by forcing the railroad to pay higher premiums to obtain future coverage. (Beach R.V.S. at 2-3.) Shippers argue that the tariff provisions are unnecessary, but their arguments ignore the reality that UP is exposed to genuine risks of significant liability arising from its transportation of TIH. Given its obligation to carry TIH materials, UP has reasonably chosen to address these risks through the tariff provisions.

1. ***UP Faces the Potential for Significant Losses.***

Because railroads have not experienced a true catastrophe involving release of TIH in a highly populated area, some shippers question whether UP really faces catastrophic liability from a TIH accident. (Occidental Op. at 3; Olin Op. at 8.) However, no shipper provides evidence showing the absence of a potential for such an accident.[4] Indeed, there can be

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[3] As UP also explained in its opening evidence, TIH accidents create the potential for significant disruptions to train operations. (UP Op. at 22.)

[4] Olin incorrectly asserts that UP has not disclosed that it is subject to catastrophic liability in connection with TIH shipments in its annual 10-K reports. (Olin Op. at 8.) UP's 10-K report expressly states that any accident involving release of TIH materials could involve "significant costs and claims," which could have a "material adverse effect" on its results. Union Pacific Corporation, 2011 Annual Report, Form 10-K, at 10 (2012); *see also id.* at 13 (noting that terrorist attacks targeted at rail cars carrying hazardous materials "may adversely affect our results of operations, financial condition, and liquidity"). These are the accounting characterizations appropriate to describe the potential for losses of great magnitude.

no doubt that TIH poses catastrophic risks.[5] Even if there are few injuries, a TIH release can cause massive disruption, both to rail operations and to the public.[6]

The verified statement of Warren Beach submitted in Ex Parte No. 677 (Sub-No. 1) described estimates prepared by the American Academy of Actuaries for costs of terrorist incidents involving TIH in more heavily populated areas, including up to $778.1 billion for an incident in New York City.[7] While the probability of such a catastrophic incident may be small, any suggestion that such incidents could never occur is neither credible nor responsible. And, as discussed further below, while it is particularly difficult to predict and quantify large losses related to "black swan" events that have a low probability of occurrence and uncertain timing, that does not make it unreasonable to anticipate and provide for such events.

2. *UP Is Exposed to Liability When It Is Not at Fault.*

Several shippers suggest that there is no need for the tariff provisions because TIH accidents will always result from railroad negligence. (Interested Parties Op. at 7-8; CF Industries, Inc.'s Opening Evidence and Argument ("CF Industries Op.") at 7-10.) They are wrong. If shippers truly believed it, they would not be concerned by the tariff provisions,

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[5] *See, e.g.*, Benjamin Brodsky, *Industrial Chemicals as Weapons: Chlorine*, Monterey Institute of International Studies (July 31, 2007), *available at* http://www.nti.org/analysis/articles/industrial-chemicals-weapons-chlorine/ (toxic chemicals released in the course of an accident "can form a toxic gaseous plume that when carried by wind is capable of inflicting potentially catastrophic loss of life on the population in its path").

[6] *See, e.g.*, Yechiel Soffer, et al., *Population Evacuations in Industrial Accidents: A Review of the Literature about Four Major Events*, 23 Prehospital and Disaster Medicine 276, 276-78 (May-June 2008), *available at* http://pdm.medicine.wisc.edu/Volume_23/issue_3/soffer.pdf (1979 derailment in Mississauga, Canada, forced a massive evacuation of a populated area, displacing more than 200,000 residents from their homes for several days due to leaking chlorine).

[7] Mr. Beach's verified statement from Ex Parte No. 677 (Sub-No. 1) is attached to Mr. Beach's reply verified statement in this proceeding.

because the tariff clearly states that UP will be responsible for liabilities arising from its own negligence. Moreover, the shippers provide no evidence that UP's liability will always be confined to its own negligence, or to the extent of its own negligence.[8] As shown by examples listed in UP's opening evidence, UP could incur significant losses due to the acts of third parties or to a severe weather event or other Act of God. (UP Op. at 6-7.)

Olin suggests that UP has no reason to be concerned because it is insulated from liability when it is not at fault. (Olin Op. at 8-10.) But if Olin believed that, it would not be concerned by the tariff provisions, because there would be no UP loss for it to indemnify under the tariff terms. As shown by the examples listed in UP's opening evidence, however, situations can arise in which UP could be held liable or suffer losses of its own when it is not at fault. (*See,*

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[8] One reason why there is a need for the indemnity requirement in the tariff is that, under the laws of most jurisdictions, any UP right to contribution and equitable indemnity would be extinguished by settlement. *See, e.g., Willdan v. Sialic Contractors Corp.*, 69 Cal. Rptr. 3d 633, 637 (Ct. App. 2007) ("A settlement made in good faith ... bars claims against the settling defendant for contribution or indemnity by other joint tortfeasors, including claims for total [equitable] indemnity, partial indemnity and implied contractual indemnity."). The indemnity protection provided by the tariff, however, will be enforced like a contractual indemnity and will not be extinguished by settlement. *See, e.g., Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 831 (5th Cir. 1992) ("Although the Texas legislature has effectively abrogated the common law right of indemnity, the legislature has not attempted to curtail the availability of contractual indemnity. An agreement which states that one party will indemnify another is binding and effective. No statutory or common law principles other than those that govern the construction of contracts usually alter the validity of an indemnity agreement."); *Donovan v. Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985) ("[W]e know of no principle under which a settlement could interfere with the rights of other tortfeasors to seek indemnity (as opposed to contribution) from the settling defendants."); *Bay Dev., Ltd. v. Superior Court*, 791 P.2d 290, 302 (Cal. 1990) ("[A] settlement would not preclude an indemnity action based on an express indemnity agreement.... Such agreements often provide an efficient means of allocating responsibility.... [I]t would be unfair to permit a party that has agreed to indemnify to escape its express contractual obligations by entering into a partial settlement."); *Am. Nat'l Bank & Trust v. Bransfield*, 576 N.E. 2d 1013, 1018 (Ill. App. Ct. 1991) ("The [Illinois] Contribution Act does not extinguish the right of parties involved in pretort relationships to arrange for contractual indemnity.").

e.g., UP Op. at 7 (discussing CERCLA liability in the event of loss due to a terrorist attack).)[9] And. in some situations UP may be charged with the entire loss, even if it is only partially at fault. UP's opening comments cited a Texas statute that could make UP liable for all damages when its share of the fault was only 51%. (UP Op. at 6.) Reply Exhibit A lists a number of other situations under which UP could be held liable for losses not due to its own fault under a variety of state laws.

Nor would federal preemption protect a railroad in many cases from liability associated with the acts of third parties or Acts of God. Congress and the courts have limited the scope of federal preemption, leaving substantial room for railroads to be held liable under state law. Congress recently amended 49 U.S.C. § 20106 to make clear that the Federal Rail Safety Act does not preempt actions under state law seeking damage for personal injury, death, or property damage alleging that a railroad has failed to comply with a federal standard of care with respect to railroad safety or security matters, or failed to comply with its own plan, rule, or standard created pursuant to a federal regulation or order, or failed to comply with a state law, regulation, or order that is not incompatible with a federal regulation covering the same subject matter. Courts have also limited the scope of federal preemption. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

In addition, although some shippers assert that no state would subject UP to strict liability for TIH accidents (Occidental Op. at 4; Olin Op. at 8-9), decisions in several states in

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[9] *See also City of Gary, Ind. v. Shafer*, 683 F. Supp. 2d 836, 852 (N.D. Ind. 2010) ("The liability under [CERCLA § 107(a)] is strict liability and joint and several liability: *innocence of the defendant is irrelevant.* This right of recovery includes both costs that have already been incurred as well as future costs for completion of the clean-up.") (citations omitted) (emphasis added).

which UP operates suggest that a common carrier might be held strictly liable for damage associated with its carriage of TIH. *See, e.g.*, *Chavez v. S. Pac. Trans. Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976) (holding railroad strictly liable after 18 boxcars loaded with bombs being shipped under Navy contract exploded in a rail yard); *Nat'l Steel Serv. Ctr., Inc. v. Gibbons*, 319 N.W.2d 269 (Iowa 1982) (holding rail carrier of propane tanks strictly liable for damages to warehouse); *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972) (owner of gasoline truck held strictly liable for death of motorist killed when automobile encountered pool of spilled gasoline on highway).

Olin also suggests that railroads would not be subject to strict liability under CERCLA because they could invoke an Act of God defense. (Olin Op. at 9-10.) However, in virtually all cases this is not an effective defense. *See* Kenneth T. Kristl, *Diminishing the Divine: Climate Change and the Act of God Defense*, 15 Widener L. Rev. 325. 343 (2010) ("[C]ourts have construed the Act of God defense arising from the OPA/CERCLA definition very narrowly, attributing this narrow construction to Congress's clear intent to impose liability except in very limited or rare circumstances.") (internal footnote omitted). Successful use of the defense requires that the Act of God be the sole cause of release, and that the release could not have been foreseen or avoided. *See United States v. English*, No. CV00-00016, 2001 WL 940946, at *4 (D. Haw. Mar. 28, 2001) (citing *Reliance Ins. Co. v. United States*, 677 F.2d 844, 849 (Ct. Cl. 1982)); *see also* Laurencia Fasoyiro, *Invoking the Act of God Defense*, 4 Envt'l & Energy L. & Policy J. 1. 3 (2009). UP has found no case in which this defense has been successfully asserted against a CERCLA claim. *See* Joel Eagle, *Divine Intervention: Re-Examining The "Act of God" Defense in a Post-Katrina World*. 82 Chicago-Kent L. Rev. 459, 462 (2007) ("[A]lthough

the defense has been available for nearly three decades, there is not a single case on record where a court has granted an otherwise liable party relief by accepting the act of God defense.").

3. *UP Cannot Avail Itself of the Option Not to Transport TIH.*

Shippers suggest that there are other approaches UP could take to address its concerns about TIH liability, but they identify no realistic alternatives. The Board has held that railroads have a common carrier duty to transport TIH materials and that they may not limit their exposure to liability associated with such transportation by declining to carry TIH materials or even by requiring a shipper to reduce the transportation distance, and thereby reduce the risk, by shipping such materials from a closer source.[10] Indeed, the Board requires railroads to transport TIH materials over thousand-mile routes to locations that produce the same materials.[11] Thus, unlike some other transportation modes such as trucks, railroads are unable to avoid transporting TIH.

4. *UP Cannot Simply Address TIH Liability Concerns by Acquiring Insurance.*

Some shippers complain that UP has not submitted evidence about the availability and cost of insurance, implying that insurance coverage could solve UP's concerns. (Occidental Op. at 4; Olin Op. at 11.) In fact, UP has already supplied the Board with evidence on insurance issues, in STB Ex Parte No. 677 (Sub-No. 1). In that proceeding, Warren Beach, UP's Assistant Vice President for Finance and Insurance, explained that in 2008 the total amount of coverage UP could acquire (at a reasonable price) was in the range of $1 billion. That amount of coverage falls far short of the potential size of losses from a catastrophic accident. As Mr. Beach noted

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[10] *See Union Pac. R.R. – Petition for Declaratory Order*, FD 35219 (STB served June 11, 2009).
[11] *See id.*

then, the American Academy of Actuaries estimated that losses from a terrorist incident resulting in a chemical release in an urban area could range up to $42.3 billion for an incident in Des Moines and up to $778.1 billion for an incident in New York City. (Mr. Beach's statement in Ex Parte No. 677 (Sub-No. 1) is attached to his verified statement submitted with this reply.) Ms. Duren noted in her statement in this proceeding that UP's current total commercial liability insurance is $1.2 billion. (Duren V.S. at 5 n.5.) Thus, even *if* UP could double or triple its coverage, it would not come close to covering the potential loss in a truly catastrophic event. (Beach R.V.S. at 2.)

Insurance is not an adequate solution for smaller TIH accidents either. As Mr. Beach explains in the verified statement submitted with this reply, UP must self-insure up to at least $25 million. (*Id.* at 1.) As a result, UP will not recover anything from its insurance if an accident generates losses below that amount, or if there are several accidents in a year, each below the retention amount. If an accident results in losses above that self-insured retention, insurance will cover that higher layer of losses. However, any insurance payment for the first incident in a coverage year will reduce the amount of coverage available to UP for the remainder of the year. (*Id.* at 2-3.) In his reply verified statement, Mr. Beach describes a situation in which UP would be required to cover the entirety of a $50 million loss after an earlier accident during the same policy year used up a portion of UP's initial layer of commercial liability insurance. (*Id.* at 2-3.)

Moreover, one or more TIH accidents will increase UP's risk profile for insurance underwriting purposes. Insurers are likely to respond to such losses by raising UP's premiums for the same amount of coverage, or by restricting the availability of coverage. (*Id.* at 3; *see also* Union Pacific Corporation, 2011 Annual Report, Form 10-K, at 13 (in the event of terrorist

attacks targeting rail cars carrying hazardous materials, "insurance premiums for some or all of our current coverages could increase dramatically, or certain coverages may not be available to us in the future").) In addition, a TIH accident experienced by UP (or another rail carrier) could lead insurers to return UP's premiums and revoke its coverage in the middle of the policy year, leaving UP without coverage, and scrambling to locate new coverage in the middle of the year, almost certainly at a higher price. (Beach R.V.S. at 3.)

Olin insists that it can solve UP's liability concerns by offering to pay the portion of UP's insurance premiums attributable to Olin's TIH shipments. (Olin Op. at 11.) UP welcomes Olin's acknowledgment that it should bear the costs of liability its TIH shipments may impose on UP. But Olin's offer is an empty gesture because it fails to account for the burden UP assumes through its self-insured retention. Moreover, UP acquires insurance to cover all of its operations. Neither the coverage nor the premiums are broken down by commodity, much less by individual shipper. (Beach R.V.S. at 3.) Thus, UP could not calculate with precision which part of its premiums are attributable to Olin's TIH shipments. (*Id.*) If UP attempted to perform such calculations, Olin would undoubtedly dispute them.

The difficulty of quantifying the risk and costs associated with either carriage of all TIH shipments or carriage of a particular TIH producer's shipments reinforces the need for the indemnity provisions at issue here and the reasonableness of UP's approach. Because the risk and costs associated with UP's transportation of a shipper's TIH cannot be easily quantified, the better solution is to place the liability on the shipper, rather than expending resources on a dispute about the dollar value of the exposure. If Olin is truly willing to pay the portion of UP's insurance premiums attributable to Olin's TIH shipments, it should not object to directly taking on the liability itself by indemnifying UP, thereby avoiding a difficult effort to quantify the

insurance costs precisely. *Cf. Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry., Boston & Maine Corp., & Portland Terminal Co.*, 3 S.T.B. 157, 161 (1998) (requiring Amtrak to cover the risk of damages from its operation over lines of freight railroads by either fully indemnifying the railroads or purchasing insurance to cover the railroads' assumption of liability for all losses). And there is certainly no reason for Olin to object to taking on the indemnification obligation if it truly believes (as it claims) that federal and state law would not impose liability on UP where UP was not at fault. (Olin Op. at 8.)

5. *UP Cannot Be Assured of Covering the Costs of TIH Liability Through the Rates It Charges TIH Shippers.*

Some shippers argue that UP is already covering the costs of TIH liability through the rates it charges shippers because its liability insurance costs are already incorporated into the rates it charges TIH shippers. (Occidental Op. at 6: Olin Op. at 20, 23 n.62.) However, UP's rail rates are constrained by regulation, and the Board's regulatory regime does not ensure that rates will be allowed to cover the costs associated with transporting TIH. (UP Op. at 19 & Shavell V.S. at 14.) Regulatory constraints are particularly problematic with respect to rates for transporting TIH for two primary reasons.

First, the Board's Uniform Railroad Costing System ("URCS"), which plays a central role in each of the Board's methods of testing rate reasonableness, does not allocate the higher costs associated with transporting TIH to movements of TIH. From the perspective of URCS, a railroad's costs of moving a tank car of chlorine appear no different than the costs of moving a tank car of corn syrup, except for differences in such items as lading weights and car size. In other words, URCS spreads the costs a railroad pays for insurance, as well as the expenses it incurs to provide safe and secure operations, across all traffic, without regard to whether certain costs are higher because of the hazardous nature of the commodity. The Board

has recognized this issue, but it has not yet proposed a solution. *Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials*, EP 681 (STB served Jan. 5, 2009) at 2 ("URCS spreads those expenses across all traffic of the railroad, rather than attributing those higher insurance costs specifically to the transportation of the hazardous materials."). Shippers are therefore wrong when they suggest that railroads can be assured of recovering the costs of liability insurance through the rates charged to TIH shippers.

Second, URCS reflects only historical costs incurred by railroads, and it therefore fails to address UP's actual risks and costs associated with TIH liability for which UP does not have insurance. As discussed above, UP's insurance is limited to $1.2 billion, but the potential losses resulting from a TIH incident are much higher. But URCS has no way to assign any costs to TIH traffic that reflect the risks associated with UP's exposure to losses above its insured limit when it transports TIH.

None of the shipper filings explains how a railroad could establish rates that would account for these risks and be assured of passing muster under the Board's tests for rate reasonableness.

* * *

UP clearly faces a significant risk of liability through no fault of its own merely as a result of carrying TIH materials. In view of the limited options available to UP to control these risks, allocating liability through a tariff, including by imposing an indemnity requirement on the shipper, is the most efficient approach. Even if other solutions exist, use of tariff terms to allocate liability through an indemnity provision is plainly a reasonable measure, especially when the government forces railroads to meet all demands for carriage, no matter how risky.

B. A Board Ruling that the Tariff Provisions Are Reasonable Would Not Conflict with Other Laws and Would Reduce Uncertainty.

Several shippers assert that, contrary to the Board's earlier judgment, issuance of a declaratory order in this proceeding would not reduce uncertainty. They acknowledge that a ruling in their favor – *i.e.*, an order declaring the tariff provisions to be unreasonable – would provide certainty. But they insist that a ruling that the provisions are reasonable would merely create confusion and conflicts with other laws, including state law governing allocation of liability and the permissibility of indemnity provisions.

This argument makes no sense. In its order commencing this proceeding, the Board recognized that the reasonableness of the tariff provisions under the Interstate Commerce Act is separate from the question of the enforceability of the provisions under state law. *See* December 12 Order at 4. A ruling that the provisions are reasonable under the federal statute will eliminate uncertainty as to the first issue. Moreover, such a ruling may also inform any determination of the state law question, or eliminate the need to consider it at all, thus helping ensure predictability in dealings between UP and TIH shippers that use common carrier rates.

1. *A Board Ruling that the Tariff Provisions Are Reasonable Would Not Conflict with State or Federal Law Regarding Allocation of Liability.*

The shippers argue that a Board ruling that the tariff provisions are reasonable will create confusion by setting up a conflict with both state tort law and federal environmental law regarding allocation of liability among parties. Olin in particular argues that state tort law has evolved over many years, resulting in well-established principles governing how liability should be allocated. (Olin Op. at 16 & n.43, 17 & nn.44-46.) But Olin is entirely wrong to suggest that the use of indemnification provisions is inconsistent with state laws regarding allocation of liability. State legislatures and courts have, over time, developed default rules for

allocating liability, but courts routinely uphold the use of indemnification provisions to allocate liability among parties.[12]

Moreover, state law will continue to govern fundamental tort concepts such as duty, foreseeability, and proximate cause, and thus will continue to govern determinations of liability for a TIH accident. Similarly, state and federal environmental laws will continue to govern liability as to governmental agencies. The tariff provisions will affect only the rights or remedies of UP and a TIH shipper with respect to each other.[13] Any indemnification obligation will arise only if and when a determination of liability under state or federal law occurs.

Olin's assertion that the tariff provisions conflict with CERCLA reflects its confusion between the determination of a party's liability and a party's ability to obtain indemnification for that liability. Olin argues that CERCLA provides certain defenses to liability, which implies that railroads are not entitled to indemnification in other circumstances. (Olin Op. at 9-10.) However, Olin is incorrect. In fact, CERCLA expressly permits indemnification agreements. CERCLA provides:

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[12] In all of the states that Olin cites as examples of situations in which courts or legislatures have adopted rules for allocating liability, courts have upheld the use of indemnification agreements. *E.g.*, *Home Ins. Co. of Ill. v. Nat'l Tea Co.*, 588 So. 2d 361, 364-65 (La. 1991); *Manhattan Real Estate Partners, L.L.P. v. Harry S. Peterson Co.*, No. 80-CIV-3015, 1992 WL 15130, at *1-2 (S.D.N.Y. Jan. 17, 1992); *John W. Eshelman & Sons, Inc. v. Seaboard Coast Line R.R.*, 431 So. 2d 345, 346 (Fla. Dist. Ct. App. 1983); *Deminsky v. Arlington Plastics Mach.*, 638 N.W.2d 331, 341 (Wis. Ct. App. 2001) (citing *Dykstra v. Arthur G. McKee & Co.*, 301 N.W.2d 201, 206-07 (Wis. 1981)); *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 892-93 (Tenn. 2002).

[13] *See Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 343 (7th Cir. 1994) ("Indemnification does not ... 'transfer' liability from the person indemnified. The latter remains fully liable to the victims of his wrongdoing. If a person buys automobile liability insurance and later is sued for damages arising out of an automobile accident, he cannot defend by saying, 'I have insurance, so am not liable to you; go sue the insurance company.' In most states the victim could not sue the insurance company if he wanted to.").

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. *Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.*

42 U.S.C. § 9607(e)(1) (emphasis added). In other words, potentially responsible parties remain liable to the government and other parties for harms covered by the statute (the first sentence of the section quoted above), but they also remain free to determine through private indemnity agreements who ultimately pays that liability (the second sentence of the quoted section).[14] Thus, as courts have explained, "enforcement of indemnification clauses" in CERCLA cases "does not frustrate public policy." *Jones-Hamilton Co. v. Beazer Materials & Servs.*, 973 F.2d 688, 692 (9th Cir. 1992); *see also Village of Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785, 792 (N.D. Ill. 1992) (explaining that an indemnity provision does not "prejudice the right of the government to recover cleanup or closure costs from any responsible party").

The tariff provisions do not undermine UP's CERCLA obligations to remediate any environmental damages, and UP will continue to be a first responder in the event of an accident while it is transporting TIH. However, allocation of CERCLA-related costs to the shipper – the party that chose to introduce the TIH risk in the first place and that is best

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[14] *See Harley-Davidson, Inc.*, 41 F.3d at 342-43 ("The [107(e)] subsection taken as a whole is notably obscure, but ... it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. The first sentence speaks of 'transfer[ring] ... liability,' that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.") (citations omitted).

positioned to limit the amount of TIH shipped – is consistent with federal environmental policy and will help to reduce the risk to the public.

2. *The Tariff Provisions Are Consistent with State Law Principles Regarding Enforceability of Indemnity Agreements.*

Several of the cases the shippers cite to support their claim that the tariff provisions conflict with state law involve attempts by a party to contract for indemnity against its own negligence.[15] UP remains liable for its own negligence under the tariff provisions. so those cases do not demonstrate any conflict between the provisions and state law. Many of the other cases the shippers cite do not even involve indemnity clauses that were held impermissible under state law – primarily. they are cases in which a particular indemnity clause was found not to apply to a particular factual situation.[16]

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[15] *See Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 341 (Ky. Ct. App. 2008) (cited in Interested Parties Op.); *Pennsylvania R.R. v. Kent*, 198 N.E.2d 615, 619 (Ind. Ct. App. 1964) (cited in Interested Parties Op.); *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 202 (3d Cir. 1995) (upholding a limitation of liability clause and noting, in dicta, the considerations for upholding clauses under which a party is indemnified for its own negligence) (cited in Interested Occidental Chemical Op. and Olin Op.).

[16] *See Robertson v. New Orleans & Great N.R.R.*, 129 So. 100 (Miss. 1930) (railroad not entitled to rely on limitation on liability in land grant as a nuisance defense when nuisance-causing activities occurred outside the land subject to the grant) (cited in Interested Parties Op.); *Luedeke v. Chicago & N.W. Ry.*, 231 N.W. 695 (Neb. 1930) (language of indemnity clause did not apply to railroad's activities) (cited in Interested Parties Op.); *Sommerville v. Pennsylvania R.R.*, 155 S.E.2d 865 (W. Va. 1967) (railroad not entitled to rely on indemnity clause against a third party that did not sign the agreement; implying. in dicta, that the railroad may be able to seek indemnity from the other party) (cited in Interested Parties Op.); *Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920) (decided under a repealed statutory scheme) (cited in Dyno Nobel Op.); *Kansas City Power & Light Co. v. United Tel. Co. of Kan.*, 458 F.2d 177 (10th Cir. 1972) (upholding decision of lower court that the language of an indemnity clause showed the parties did not intend to indemnify for a party's own negligence) (cited in Occidental Chemical Op. and Olin Op.); *Fox v. Vice*, 131 S. Ct. 2205 (2011) (defendant in a civil rights case involving frivolous and non-frivolous claims entitled to reasonable attorney's fees and costs incurred only for the frivolous claims) (cited in Olin Op.).

The shippers also argue that state laws prohibit indemnity agreements between parties with unequal bargaining power. In fact, all but one of the cases they cite for that point address indemnification for a party's own negligence.[17] The sole exception is a case from Ohio, where UP has no rail lines, in which the court explained that Ohio public policy prohibited a lender from enforcing a "one-sided obligation" requiring a borrower with little bargaining power to pay the lender's attorneys' fees "arising from any dispute over [borrower's] debt." *Moxley v. Pfundstein*, No. 1:10 CV 2912, 2011 WL 2728354, at *5 (N.D. Ohio 2011) (cited by Occidental and Olin). That case has no bearing here. First, UP's tariff provisions plainly have a legitimate purpose, unlike the lending agreement, which apparently imposed the attorney-fee requirement to discourage borrowers from filing legal claims against the lender. Second, the tariff provisions do not create a one-sided obligation: UP is required to indemnify TIH shippers for liabilities arising from railroad negligence in transporting TIH. *See* Item 50.1. Finally, to the extent that TIH shippers and railroads are in a situation of unequal bargaining power, it is TIH shippers that have the stronger bargaining position, due to railroads' common carrier obligation.[18] Shippers

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[17] *See Del Raso v. United States*, 244 F.3d 567, 570 (7th Cir. 2001) (cited in Occidental Chemical Op. and Olin Op.) (upholding an indemnification clause releasing a party from liability due to its future negligence, and noting in dicta that such clauses are enforceable unless they violate a statute, are gained through inequality of bargaining power, or contravene public policy); *Kansas City Power & Light Co.*, 458 F.2d at 179-180 (upholding decision of lower court that the language of an indemnity clause showed the parties did not intend to indemnify for a party's own negligence) (cited in Occidental Chemical Op. and Olin Op.); *Valhal Corp.*, 44 F.3d at 202 (upholding a limitation of liability clause capping damages caused by a party's negligence) (cited in Occidental Chemical Op. and Olin Op.).

[18] Even in true contracts of adhesion, courts will uphold indemnity provisions so long as they are substantively reasonable, as the tariff provisions are, for the reasons described in UP's opening evidence. *See, e.g., Pritchard v. Dent Wizard Int'l Corp.*, 275 F. Supp. 2d 903, 917 (S.D. Ohio 2003); *Walters v. A.A.A. Waterproofing, Inc.*, 85 P.3d 389, 393-94 (Wash. Ct. App. 2004).

can force UP and other railroads to take on the enormous risk of transporting TIH, whether or not they would otherwise choose to do so.

3. *Unregulated Carriers Use Indemnity Provisions When They Transport TIH Without Facing Claims that Indemnification Is Inconsistent with State Law.*

As Norfolk Southern shows in its opening evidence, indemnity provisions are commonplace in unregulated transportation settings when carriers are asked to transport hazardous commodities. (Opening Evidence and Argument of Norfolk Southern Railway Company ("NS Op.") at 25-27.) For example, UPS's tariff requires shippers to "indemnify, defend, and hold harmless UPS . . . from all claims, demands, expenses (including reasonable attorney's and consultant's fees), liabilities, causes of action, enforcement procedures, and suits of any kind or nature brought by a governmental agency or any other person or entity arising from or relating to the transportation of a Hazardous Materials package."[19] ABF Freight System's tariffs provide that ABF will ship hazardous materials if "any and all liability for damages resulting from the hazardous material [is] borne by the Customer."[20] UP is not aware of any case in which such indemnity provisions have been voided as against public policy, or otherwise determined to "contravene[] the principles of justice, deterrence, and causation underlying tort law." (CF Industries Op. at 5.)

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[19] UPS Tariff/Terms and Conditions of Service for Package Shipments in the United States, § 3.8, *available at* http://www.ups.com/media/en/terms_service_us.pdf.

[20] ABF Rules and Special Service Charges (ABF 111-AD) (July 25, 2011), Item 973: Transportation of Hazardous Materials or Substances, *available at* http://www.abfs.com/resource/ABF111/Items/item973.asp.

4. *A Board Ruling that the Tariff Provisions Are Reasonable Would Ensure Uniformity and Predictability in Dealings Between UP and TIH Shippers that Use Common Carrier Rates.*

Shippers' arguments that the Board should stay its hand reflect a preference that state law rules govern TIH risk allocation. Several shippers anticipate that a Board ruling that the tariff provisions are reasonable may preempt state law governing the enforceability of indemnity clauses. (Interested Parties Op. at 4; Olin Op. at 18-19; CF Industries Op. at 4.) The prediction that such a ruling would preempt state law is likely correct; however, preemption should have no practical impact, because the provisions were written to be enforceable under state laws, which allow such indemnification terms.

The Board's jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers . . . is exclusive." 49 U.S.C. § 10501(b). The Board's exclusive jurisdiction extends to determining "whether the terms and conditions under which railroads transport TIH material are reasonable." *Union Pac. R.R. – Petition for Declaratory Order*, FD 35219 (STB served June 11, 2009) at 3 n.12 (citations omitted); *see also Consol. Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981); *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1170 (6th Cir. 1979).

The prospect of preemption is not a reason for the Board to stay its hand in this proceeding; indeed, just the opposite. Rail transportation is an interstate business. UP operates in 23 states, each with its own standards for allocation of liability. Many TIH shipments move through multiple states. For example, Canexus's chlorine shipments on UP from Portland,

Oregon, to Arkansas move through eight different states.[21] Use of the tariff provisions to establish uniform rules for allocating liability as between UP and its TIH shippers promotes efficiency by avoiding repeated litigation under the laws of 23 states and by providing the parties with greater predictability in their dealings. In contrast, a finding that the provisions are unreasonable would expose UP and its TIH shippers that use common carrier rates to the uncertainty of which state's law regarding contribution would apply.

This is not to say that state law and state courts will have no role in allocating liability or addressing issues that may arise under the tariff provisions. As discussed above, state law will continue to govern UP's direct liability to parties injured in incidents involving TIH. There will be no need for the Board to become involved in determining negligence standards. The tariff provisions deal only with the allocation of liability, not the determination of liability. The provisions do not absolve UP from any liability it may have under state law (or federal law) to injured third parties, injured employees, or for government-imposed fines and penalties. The provisions merely allocate such liabilities as between UP and the TIH shipper. State courts may also be involved in resolving disputes between UP and TIH shippers regarding the application of the indemnity provisions in specific cases.

At a minimum, however, when state courts are asked to determine whether the tariff provisions are consistent with public policy, they must defer to the Board's determination regarding the reasonableness of the tariff provisions. A determination that the provisions are reasonable should be sufficient to preempt any state law that might otherwise be asserted as a

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[21] The Board should be familiar with this movement. In a recent proceeding, it addressed the question whether UP or BNSF Railway was required to provide rates to move the traffic on the portion of the route from Portland to Kansas. *See Canexus Chems. Canada. L.P. v. BNSF Ry.*, NOR 35524 (STB served Feb. 8, 2012).

basis for voiding the indemnity requirement on public policy grounds. *See, e.g*, *Deweese v. Nat'l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 251-52 (3d Cir. 2009) (federal law allowing Amtrak to enter into indemnity agreement preempted the indemnifying party's state-law sovereign immunity defense to providing indemnification); *O&G Indus., Inc. v. Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 163 (2d Cir. 2008) (federal law allowing Amtrak to enter into liability-shifting agreements preempted Connecticut statute that voided indemnity agreements purporting to insulate a party from its own negligence).

* * *

In short, the Board should proceed to determine the reasonableness of the tariff provisions. There is no basis for the shippers' suggestion that a determination that the provisions are reasonable would create a conflict with other laws. As the Board initially determined, a Board decision on this matter would remove uncertainty for both UP and TIH shippers.

II. SHIPPER ORGANIZATIONS WERE AWARE OF THE TARIFF PROVISIONS WHEN THEY DISMISSED THEIR PRIOR CHALLENGE.

UP's opening evidence explains that the liability-allocation language set forth in Items 50 and 60 of Tariff 6607 is the product of an effort to resolve a complaint filed by the Chlorine Institute ("CI") and the American Chemistry Council ("ACC") against UP in the federal court in Utah in June 2009. (UP Op. at 2-3.)

The Interested Parties, which include CI and ACC, claim that UP overstates the significance of the Utah proceeding because the parties never addressed whether UP would require TIH shippers to indemnify UP for liabilities caused by third parties. (Interested Parties Op. at 1 n.1.) The Interested Parties are wrong: UP and CI/ACC counsel expressly addressed

the issue of third party indemnities, and CI/ACC counsel recognized at the time that the tariff provisions would require TIH shippers to indemnify UP for liabilities caused by third parties.[22]

As UP's opening evidence explains, after CI and ACC filed a complaint in Utah claiming that UP was improperly demanding indemnification for its own negligence, UP worked with CI/ACC counsel to develop language that more clearly reflected UP's intent to require that shippers indemnify UP for all liabilities arising out of their shipments of TIH that were *not* caused by UP's negligence. (UP Op. at 3.) UP revised and simplified the provisions, and it issued a revised version of the tariff, which it provided to CI/ACC counsel on August 4, 2009.[23]

On August 6, CI/ACC counsel asked UP to consider an additional change to the provisions. He proposed an edit to Item 50.2, which he described as "merely rearranging words."[24] The proposed edit would have limited a shipper's obligation to indemnify UP to circumstances arising from a shipper's "sole negligence or fault."[25] UP recognized that the proposed edit reflected a misunderstanding of UP's intent, likely resulting from a discrepancy between Item 50.2 and Item 60. UP acted quickly to correct the misunderstanding by making modifications to Item 60. Specifically, UP modified Item 60 to make clear that, if liabilities were caused in part by a third party, UP would be liable only for the portion of such liabilities

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[22] UP is reluctant to disclose communications between counsel that occurred in connection with the Utah case, but it has concluded that such disclosure is appropriate in light of the misleading claims made in this proceeding by CI and ACC, speaking through the Interested Parties.

[23] Email from J. Michael Hemmer to Paul M. Donovan et al. (Aug. 4, 2009) (Reply Exhibit B hereto). Reply Exhibit B also includes the versions of Items 50 and 60 that UP provided to CI/ACC counsel, which UP issued on August 6.

[24] Email from Paul M. Donovan to J. Michael Hemmer (Aug. 6, 2009) (Reply Exhibit C hereto).

[25] *Id.*

allocated to the railroad in proportion to its percentage of responsibility, and the "customer shall be liable for all other liabilities."

As UP explained to CI/ACC counsel in an email transmitting another revised version of the tariff:

> Our intent is for UP to be liable for costs and losses attributable to its negligence, but only to the extent it is negligent. Thus, should an Act of God cause costs and losses, and it is determined that neither party is negligent, the shipper would be responsible because of the nature of the commodity and its effects.[26]

CI and ACC plainly recognized that UP had made this change to Item 60. and that the change applied not only to Acts of God, but also to acts of third parties. In response to UP's email, CI/ACC counsel indicated that CI and ACC understood the reason for UP's additional modifications. He illustrated his understanding using an example specifically involving indemnification for the acts of third parties:

> I understand your concerns. My hypothetical would be a shipment delivered by UP to a customer of your customer and that receiver failing to secure the valve for the return trip. The car gets half way to destination and leaks. Why should UP have to pay legal fees to defend itself, and it will be sued, when it had no relationship to the negligent party and the shipper did and the shipper had the ability to seek indemnification from that receiver.[27]

In the same email, CI/ACC counsel reported that some CI members thought that a different provision of the tariff might be "misconstrued by a court" as requiring a shipper "to

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[26] Email from J. Michael Hemmer to Paul M. Donovan (August 12, 2009) (Reply Exhibit D hereto). Reply Exhibit D also includes the versions of Items 50 and 60 that UP issued on August 12.

[27] Email from Paul M. Donovan to J. Michael Hemmer (Aug. 12. 2009) (Reply Exhibit E hereto).

indemnify UP for UP's negligence."[28] After UP asked for a more specific explanation, CI/ACC counsel said that UP could resolve the problem by adding the words "not caused by the sole or concurring negligence or fault of railroad" to the third bullet in the then-current version of Item 50.2.[29] UP revised the tariff once again to make that change, and CI and ACC subsequently dismissed the Utah case.

In the period since the Utah case was dismissed, UP has not changed the tariff provisions in any way that increases a TIH shipper's obligation to indemnify UP in situations involving third parties. In fact, in a December 2010 revision to the tariff, UP actually reduced the obligation to indemnify UP for liabilities arising from acts of third parties by adding to Item 50.2 a provision stating that a TIH shipper "shall have no responsibility to indemnify [UP] for liabilities arising from the negligence or fault of another rail carrier that participated in the movement."

UP is not arguing that CI and ACC are estopped from complaining to the Board about the tariff provisions in light of their dismissal of the Utah case. However, in evaluating CI's and ACC's current complaints, the Board should recognize that they reflect a change in position: CI and ACC reviewed the tariff provisions before dismissing the Utah case; UP's communication to CI and ACC, and the tariff provisions themselves, made clear that TIH shippers would be required to indemnify UP for liabilities caused by third parties; and CI and

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[28] *Id.*

[29] Email from Paul M. Donovan to J. Michael Hemmer (Aug. 13, 2009) (Reply Exhibit F hereto). Apparently unaware that UP added the words to the third bullet point to address concerns expressed by CI and ACC, CF Industries says that they make UP's tariff confusing. (CF Industries Op. at 11-12.)

ACC told UP that they understood the logic of UP's approach, and they expressed no objection to that approach, even while asking UP to make other changes to the tariff provisions.

III. THE SHIPPERS' CRITICISMS OF THE TARIFF LANGUAGE ARE MISGUIDED.

UP's opening evidence explains that the tariff provisions reflect a clear principle: UP is responsible for liabilities arising out of its transportation of TIH that are caused by its own negligence, and TIH shippers must indemnify UP against other liabilities arising out of UP's transportation of TIH. (UP Op. at 4-7.)

In their opening comments, the Interested Parties and a few individual shippers complain that some of the language in the tariff provisions is unclear. However, no party has demonstrated any genuine difficulty in understanding the tariff provisions. Indeed, as discussed above, after reviewing the near-final tariff language in connection with the Utah case, counsel for CI and ACC suggested just one edit to clarify one provision, and UP made the suggested edit. As discussed below, no party has identified any problem with the tariff language that would make UP's enforcement of the provisions an unreasonable practice.

1. *The Tariff Provisions Do Not Require TIH Shippers to Indemnify UP for Liability Unrelated to TIH Releases.*

The Interested Parties and Olin argue that the tariff provisions are drafted so broadly that they could be interpreted to require a TIH shipper to indemnify UP for any accident that occurs while UP is transporting their products, whether or not the accident involves their products. (Interested Parties Op. at 6-7; Olin Op. at 14.) That is not a reasonable interpretation of the provisions. As its title indicates, Tariff 6607 establishes rules for the "Movement of Toxic or Poison Inhalation Commodity Shipments," and Items 50 and 60 are designed to require indemnification only for those liabilities that are causally connected to the transportation of TIH pursuant to Tariff 6607.

Indeed, Item 50.1 makes clear in defining the "liabilities" for which UP must indemnify TIH shippers that the tariff provisions address only liabilities "arising from ... the performance of transportation services pursuant to this tariff."[30] Construed in the context of the tariff as a whole, a TIH shipper's corresponding obligations to indemnify UP pursuant to Items 50.2 and 60 plainly involve only those liabilities with a causal connection to transportation of the shipper's TIH.[31] The Interested Parties and Olin are simply wrong in suggesting otherwise.

The Interested Parties and Olin also argue that the tariff provisions are overbroad because they could be read to require a TIH shipper to indemnify UP in the absence of a release of TIH. (Interested Parties Op. at 6-7; Olin Op. at 14.) However, the provisions properly require a TIH shipper to indemnify UP for costs that may be incurred even in the absence of a release – if there is a "but for" causal connection to the transportation of the shipper's TIH. For example, if an incident occurs that is not UP's fault and government officials order an evacuation out of concern for a possible TIH release, a TIH shipper could be required to indemnify UP for the associated costs because the evacuation was causally connected to transportation of TIH. The requirement that the TIH shipper indemnify UP in such circumstances is entirely reasonable: the evacuation would not have been necessary but for the presence of the shipper's TIH.

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[30] Courts recognize that the concept of liabilities "arising" out of, or in connection with, or from, an activity means there is a causal connection between the liabilities and the principal activity of the contract – in this situation, the transportation of TIH. *See, e.g., Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1214 (5th Cir. 1986); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004).

[31] *See, e.g., United States v. Missouri-Kansas-Texas R.R.* 194 F.2d 777, 778-79 (5th Cir. 1952) ("The four corners of the instrument must be visualized and all the pertinent provisions considered together ....").

2. *The Tariff Provisions List Situations in Which a Shipper Would Be Required to Indemnify UP Simply as Illustrative Examples.*

The Interested Parties and CF Industries also complain about the examples provided in Item 50.2 of situations in which a shipper would be required to indemnify UP. (Interested Parties Op. at 3-4; CF Industries Op. at 11-12.) The Interested Parties claim the examples are confusing because they seem similar to each other, but that is because the examples all illustrate the same principle, namely, that TIH shippers must indemnify UP against liabilities arising out of UP's transportation of TIH other than those liabilities caused by UP's negligence or fault. UP illustrated the principle using different examples to help shippers better understand the various circumstances in which the tariff provisions would apply. UP is confident the Interested Parties are not confused by the examples and their purpose: as discussed above, two of the four "Interested Parties," CI and ACC, reviewed the examples in connection with the Utah case, and they suggested only one change, which UP adopted.

CF Industries' main complaint about the examples in Item 50.2 reflects a failure to read the entire Item. CF Industries argues that the first example would require a TIH shipper to indemnify UP if there is a "release" of TIH from the shipper's equipment, even if UP is at fault. (CF Industries Op. at 11-12.) However, Item 50.2 makes absolutely clear, just before listing the examples, that the item applies to all liabilities "*except* those caused by the sole or concurring negligence or fault of railroad."[32]

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[32] CF Industries says it reached its conclusion because language in the third example includes a "carve out" for situations in which the railroad is negligent. (*Id.* at 11-12.) As discussed above, UP added this "carve out" language at the request of counsel for CI and ACC to reinforce the point that UP is not seeking indemnification for its own negligence. UP similarly reinforced the boundaries of the indemnity requirement in the fourth example, which addresses fines and penalties for violation of environmental law and other law "not attributable to the railroad."

CF Industries also takes issue with the example in Item 50.2 involving fines or penalties, arguing that UP could not be penalized when it was not at fault. (*Id.* at 12.) But, as UP showed in its opening statement, there are laws under which UP could be held strictly liable for fines and penalties. (UP Op. at 7; *see also* Reply Exhibit A.) UP's example serves the purpose of bringing such situations to shippers' attention.

In addition, CF Industries misreads the tariff provisions when it complains that one paragraph in Item 50.2 requires a TIH shipper to give UP a "blanket indemnification" that absolves UP from liability if the shipper merely makes "a minor mistake in filling out a shipping document." (CF Industries Op. at 12 & 13 n.25.) The provision in question does not absolve UP from all liabilities if a shipper makes a minor mistake. Rather, the provision expressly addresses "but for" liabilities that arise "due to the presence" of TIH that is not properly disclosed. For example, UP would be indemnified if the shipper fails to disclose it is shipping TIH or fails to identify the TIH properly, leaving UP unable to warn first-responders about the special dangers of approaching the scene of an incident and a first-responder is injured as a result. In such a situation, the requirement that the TIH shipper indemnify UP is entirely reasonable: the injury would not have occurred but for the shipper's failure to disclose the presence of TIH or its chemical identity.

3. *The Tariff Provisions Cover a Reasonable Scope of "Liabilities."*

Finally, Olin complains that the tariff provisions contain an overly broad definition of "liabilities." Olin makes two specific complaints about the definition, neither of which has any merit.

First, Olin complains that the definition would require the indemnifying party to pay the indemnified party's litigation expenses. (Olin Op. at 12.) As Olin recognizes, however, the responsibility to pay litigation costs and fees can be shifted by statute or contract. (*See id.*)

Indeed, the shifting of litigation costs and fees is a common feature of indemnity provisions,[33] and it occurs under the tariff provisions whether a shipper is required to indemnify UP, or UP is required to indemnify a shipper. If the provisions are otherwise reasonable, the fact that they include litigation costs and fees is not a basis for holding them unreasonable.

Second. Olin complains that the definition of "liabilities" is unreasonable because it includes "special and consequential damages," which are recoverable only in certain situations under contract law. (Olin Op. at 12-13.) But Olin misses the point. The definition does not create new liabilities where there otherwise would have been none: the indemnifying party (which could be either UP or the shipper, depending on the situation) is required to pay special or consequential damages only if the injured party recovers those damages from the indemnified party in the first place. Moreover, requiring indemnification for special or consequential damages is a common feature of indemnification provisions.[34] Accordingly, if the provisions are otherwise reasonable, the fact that they require indemnification for special or consequential damages is not a basis for holding them unreasonable.[35]

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[33] *See, e.g., Patch v. Amoco Oil Co.*, 845 F.2d 571, 572 (5th Cir. 1988) ("It is not required that the indemnity agreement expressly stipulate that [costs of litigation, including attorney fees] are to be indemnified. They are loss arising out of or in connection with [the indemnitor's] services and merchandise from which [the indemnitee] is to be saved harmless."); *Monaghan v. United Rentals, Inc.*, Civ. Action No. 09-627, 2011 WL 6148636, at *3 (M.D. La. Dec. 9, 2011) (granting summary judgment to party seeking enforcement of clause requiring indemnification for attorneys' fees); *BP Prods. N. Am. Inc. v. J.V. Indus. Cos., Ltd.*, Civ. Action No. H-07-2369, 2010 WL 1610114, at *3 (S.D. Tex. Apr. 21, 2010) (same).

[34] *See, e.g., Monaghan*, 2011 WL 6148636, at *3 (granting summary judgment to party seeking enforcement of clause requiring indemnification for "special or consequential damage"); *BP Prods.*, 2010 WL 1610114, at *5 (holding that indemnity provision covers consequential damages).

[35] CF Industries also offers a criticism of the tariff provisions that is entirely mistaken. It asserts that the second paragraph of Item 60 "appears to prevent the shipper from reaching a settlement with an injured party." (CF Industries Op. at 13.) However, the provision, which applies to both UP and the shipper, ensures that the allocation of liabilities established in the first paragraph of (continued...)

In sum, the tariff provisions clearly communicate the extent of TIH shippers' obligations to indemnify UP. as well as UP's obligations to indemnify TIH shippers, and the scope of these obligations is reasonable.

IV. THE SHIPPERS' CRITICISMS OF THE TARIFF PROVISIONS REFLECT A MISUNDERSTANDING OF HOW INDEMNITIES WORK.

The tariff provisions at issue are similar to indemnification clauses found in many commercial contracts. It is therefore surprising that the Interested Parties and Olin object to two standard features of indemnification clauses contained in the tariff provisions, namely: (i) UP can seek indemnification from a shipper rather than pursuing a negligent third-party, even if the third party could pay for the damages it caused; and (ii) the tariff provisions do not describe in detail how defense and settlement issues will be handled.

1. *The Tariff Provisions Reasonably Allow UP to Seek Indemnification Directly from a TIH Shipper.*

The Interested Parties and Olin complain that, if UP is held liable for damages resulting from a third party's actions, UP can seek indemnification from the shipper, even if UP could recover the damages directly from the third party. (Interested Parties Op. at 6; Olin Op. at 14.) However, this is a standard feature of indemnity provisions: such terms allow the indemnified party to seek recourse from the party with which it has a relationship, rather than some unknown third party. *See, e.g., Travelers Cas. & Sur. Co. v. Elkins Constructors, Inc.*, No. IP97-1807, 2000 WL 724006, at *9 (S.D. Ind. May 18, 2000); *Manhattan Real Estate Partners, L.L.P. v. Harry S. Peterson Co.*, No. 90-CIV-3015, 1992 WL 15130, at *2 (S.D.N.Y. Jan. 17,

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Item 60 cannot be undermined by a settlement agreement – a problem that UP described in its opening evidence. (UP Op. at 6.) The provision thus does not prohibit either the railroad or the shipper from settling with an injured party; it merely makes clear that neither the railroad nor the shipper "may reduce its pro rata share of negligence or liabilities under this tariff" through any such settlement. Item 60.

1992); *see also* Reply Exhibit E ("Why should UP have to pay legal fees to defend itself, and it will be sued, when it had no relationship to the negligent party and the shipper did and the shipper had the ability to seek indemnification from that receiver.").

The Interested Parties say this feature of the tariff provisions multiplies litigation, but they are incorrect: if a shipper indemnifies UP, as required, and then seeks recovery from the third party, there need be only one litigation – just as if UP sought recovery from the third party. The tariff provisions shift the responsibility for pursuing a negligent third party from UP to the shipper, but that is their purpose – they were designed to place precisely these types of risks and costs on the TIH shipper, rather than UP.[36] Similarly, despite the fact that disputes regarding insurance coverage are often litigated, the overall effect of risk distribution through commercial insurance is not to increase litigation, and the incidental need to resolve coverage disputes through litigation does not make insurance unreasonable.

2. *Shippers and UP Are Protected Against Unreasonable Settlements.*

Olin also complains that, under the tariff provisions, UP could decide to settle a claim by an injured party, even if UP had a valid defense to liability, and then seek indemnification from a shipper. (Olin Op. at 14-15.) But Olin ignores the protections provided by state law and the tariff provisions themselves.

UP had no interest in establishing tariff provisions that potentially exposed one party to the possibility of indemnifying another party for unreasonable settlements because that would have left UP in the very same situation that Olin identifies: the tariff provisions not only

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[36] At the same time, under Item 50.3, the indemnified party has a duty to cooperate with the indemnifying party in the investigation and defense of a matter.

require TIH shippers to indemnify UP, they also require UP to indemnify TIH shippers in circumstances where a loss is caused by UP's own negligence.

UP did not need to include detailed protections against unreasonable settlements in the tariff provisions because states have well-developed common law approaches that protect the interests of both the indemnitee and the indemnitor in the settlement context. Under Texas law, for example, "'where an indemnitee enters into a settlement with a third party, it may recover from the indemnitor only upon a showing that potential liability existed, and that the settlement was reasonable, prudent, and in good faith under the circumstances.'" *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 152 (5th Cir. 2008) (quoting *Ins. Co. of N. Am. v. Aberdeen Ins. Servs.*, 253 F.3d 878, 888 (5th Cir. 2001)). Other states have similar rules. *See, e.g., S. Ry. v. Georgia Kraft Co.*, 823 F.2d 478, 480 (11th Cir. 1987) (Georgia); *Atl. Richfield Co. v. Interstate Oil Transp. Co.*, 784 F.2d 106, 110-13 (2d Cir. 1986) (New York); *Burlington N., Inc. v. Hughes Bros., Inc.*, 671 F.2d 279, 282 (8th Cir. 1982) (Nebraska); *Consol. Rail Corp. v. Ford Motor Co.*, 751 F. Supp. 674, 676 (E.D. Mich. 1990) (Michigan); *Chicago Title Ins. Co. v. Runkel Abstract & Title Co.*, 654 F. Supp. 2d 926, 928 (W.D. Wis. 2009) (Wisconsin); *Bodenheimer v. New Orleans Pub. Belt*, 845 So. 2d 1279, 1289 (La. Ct. App. 2003) (Louisiana); *Caterpillar Inc. v. Trinity Indus., Inc.*, 134 P.3d 881, 888 (Okla. Civ. Ap. 2005) (Oklahoma); *Valloric v. Dravo Corp.*, 357 S.E.2d 207, 211-14 (W. Va. 1987) (West Virginia); *Pennant Serv. Co. v. True Oil Co., LLC*, 249 P.3d 698, 705 (Wyo. 2011) (Wyoming);

Moreover, the tariff provisions address one important aspect of settlements in a term that applies to both UP and shippers: Item 60 states that "neither railroad nor customer may reduce its pro rata share of negligence or liabilities under this tariff by agreement or settlement

with any other party or claimant." Thus, neither party can avoid responsibility for its allocated portion of liability under the tariff provisions through a settlement.

Finally, in practice, the indemnified party typically tenders the defense of a matter to the indemnifying party (to minimize the risk of subsequent attempts by the indemnifying party to avoid indemnification obligations by arguing over litigation strategy and costs), and the tariff provisions contemplate this arrangement by specifically requiring the indemnified party to cooperate in the investigation and defense. Item 50.3 states:

> Any Indemnified Party shall, at the expense of the Indemnifying Party, cooperate with and take all such actions as the Indemnifying [P]arty may reasonably request to assist the Indemnifying Party in the investigation and defense of the Indemnified Matter.

Accordingly, Olin's complaint that the tariff provisions fail to protect the indemnifying party adequately with regard to the defense and settlement of claims are unfounded.

V. THE SHIPPERS' "FAIRNESS" ARGUMENTS LACK SUBSTANCE.

Some shippers suggest that a requirement that they indemnify UP for certain liabilities is somehow inequitable. But there is nothing inequitable about the tariff provisions.

Under the basic allocation of liability established by the tariff provisions, each party will bear the liability attributable to its own negligence. Nothing about this allocation (or UP's effort to make it clear) could be viewed as unfair to shippers. Indeed, no shipper appears to object to being required to pay for losses that result from its own fault, and shippers could not object to UP's statement that it will likewise be responsible for losses where it is at fault. In particular, those shippers that argue that all TIH accidents result from railroad negligence should take comfort from UP's express statement that it will bear the losses attributable to its own negligence, making clear that it will not seek indemnification from shippers for such losses.

The shippers' "fairness" complaints are thus limited to the portions of the tariff provisions that require the shipper to indemnify UP for losses the railroad suffers when it is not at fault, including losses caused by third parties or Acts of God. Shippers insist that requiring them to pay for a loss when they are not at fault is unfair. But they never explain why it is any more fair for UP to suffer such a loss when UP is not at fault and it is the shipper that decides whether to ship TIH, making a request for carriage that UP cannot refuse.

1. *Shipper Decisions and Actions Affect the Level of Risk for TIH Movements.*

As explained in UP's opening evidence, the shipper plays the most significant role in creating the potential for liability in transportation of TIH materials. It is the shipper that decides to place TIH materials on UP in the first place. The shipper (and its customers) decide the volume of the shippers' TIH materials that will move on UP and the distance the materials will move over UP's rail lines. UP on the other hand has no choice in the matter. As a common carrier, it must accept the shipments tendered to it. It has no choice as to the volume it will carry or the origin and destination; it must accept the shipments. Thus, the shipper creates the hazard (and to a large degree determines the magnitude of the hazard), imposing on UP the task of carrying an inherently hazardous material with a high potential for causing loss. In these circumstances, it is plainly fair to require the shipper to compensate UP for losses resulting from transportation of the material that are not due to the fault of UP.

Several commenters object that it is unfair to require shippers to pay for losses suffered when their shipments are under UP's control. (CF Industries Op. at 6-7; Interested Parties Op. at 12-13; Olin Op. at 16-17; Opening Comments of Canexus Chemicals Canada, L.P. ("Canexus Op.") at 3-4.) No shipper explains why it is unfair. If UP has exercised its control

properly, without negligence, why should UP be responsible for liability that exists only because of the extremely dangerous nature of the commodity?

Moreover, as explained in UP's opening evidence, such arguments disregard the significant role shippers have, not only in creating the hazard in the first place (by requiring UP to carry their TIH materials), but also in controlling the risk of loss while their shipments are on UP's rail lines. (*See* UP Op. at 20-23; O'Brien V.S. at 5-9.) Shippers decide what tank cars to use for their shipments and thus have the option to acquire cars that exceed minimum safety requirements. If the shipper elects to use safer tank cars, it can reduce the likelihood that a car will rupture during transit. And, as explained in UP's opening evidence, shippers can play a particularly important role by choosing to provide effective assistance to UP in emergency responses to accidents involving their TIH materials. A knowledgeable shipper expert, who is familiar with the product in question and with the best ways to control chemical reactions or spread of a chemical, can be critical to minimizing harm from a release or threatened release of TIH. The tariff provisions provide shippers with a greater economic incentive to assist UP in responding effectively to such a situation.

Moreover, the shippers overstate the degree to which UP can control certain risks. For example, despite suggestions to the contrary, railroads do not control many of the risks associated with highway grade crossings. UP cannot control the dozens of drivers each year who drive through or around the best technology available for grade crossings. State agencies, not railroads, decide which crossings receive warning devices and the type of device to be installed. *See* U.S. Dep't of Transportation, Federal Highway Administration, Manual on Uniform Traffic Control Devices § 8A.01 (2009 ed.) ("The highway agency or authority with jurisdiction and the regulatory agency with statutory authority, if applicable, jointly determine the need and selection

of devices at a grade crossing."). Railroads need consent of a public agency to remove a public crossing. *See id.* § 8A.02 ("Before . . . modifications are made to an existing [traffic control] system, approval shall be obtained from the highway agency with the jurisdictional and/or statutory authority, and from the railroad company."). That consent can be difficult to obtain due to pressure from the driving public. Private crossings can be imposed on railroads over their objections. *See, e.g., Franks Inv. Co. LLC v. Union Pac. R.R.*, 593 F.3d 404, 415 (5th Cir. 2010) (rejecting UP's effort to invoke federal preemption to counter developer's demand for crossings).

UP works very hard to avoid accidents of all sorts, including those involving TIH materials. As described in UP's opening evidence, the railroad has strong incentives to do so, in view of the liability it would incur as a result of any negligence of its own and the disruption to its operations that all accidents (and especially TIH accidents) can cause. (UP Op. at 22; O'Brien V.S. at 9-11.) But UP cannot control all risks. Shippers should have equally strong incentives to take an active part in reducing the risks. Because shippers are responsible for the basic decision to ship TIH materials on UP and for the volume and distance of such shipments, it is fair and reasonable to make them responsible for losses that are not due to UP negligence.

2. *The Tariff Provisions Merely Allocate Liability.*

UP is not asking shippers to take on more liability than UP is now bearing and has borne in the past. The tariff provisions do not create or negate liability, they merely allocate liability. Under the tariff provisions, a shipper must pay UP only when the railroad has suffered a loss; that is the nature of an indemnity obligation. If the shipper did not indemnify UP, then UP would be left to bear a loss it did not cause. It is entirely fair to require that the shipper, the party that creates the risk of loss by requiring UP to carry TIH materials and dictating the volume and distance of such shipments, assume that burden.

3. *The Tariff Provisions Do Not Allow for Double Recovery by UP.*

Some shippers suggest that UP is already recovering the cost of TIH-related losses in its rates and that it is "double dipping" when it requires shippers to indemnify it for those losses. (Occidental Op. at 6.) The shippers present no evidence that UP is currently recovering these costs. UP's rail rates are not cost-based; rather, they are determined by the market. Even if all of the risks inherent in TIH transportation could be accurately quantified (and this is virtually impossible), it is unlikely that the market price would incorporate such risks.[37] In addition, UP's rates are constrained by regulation, and for the reasons UP has already described, the Board's rate regulation principles do not ensure that the special risks presented by TIH transportation will be recognized. (UP Op. at 19; Shavell V.S. at 14; *see also* pp. 13-14, *supra.*)[38] Finally, a challenge to the tariff provisions on double recovery grounds is really nothing more than a challenge to the rate for indemnified transportation. If a TIH shipper believes UP's rate is too high, its recourse is through a rate reasonableness complaint, not an unreasonable practice claim. *See Union Pac. R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).[39]

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[37] As Judge Posner has noted, various factors make it unlikely that we will be prepared for disastrous events, including uncertainty about timing and inability to determine probability of the risk. *See* Richard A. Posner, "From the Oil Spill to the Financial Crisis, Why We Don't Plan for the Worst," *Washington Post*, June 6, 2010, at B-1. *See also* Nassim Taleb, *The Black Swan: The Impact of the Highly Improbable* (2d. ed. 2010).

[38] Moreover, to the extent that UP's costs to obtain insurance might decrease because the tariff provisions shift the risk of certain liabilities from UP to TIH shippers, the reduction in costs would be reflected in any URCS calculations used in rate cases, so TIH shippers would get the benefit of any actual cost reductions – that is, there would be no "double dipping."

[39] *See also Kansas City Power & Light Co. v. Union Pac. R.R.*, NOR 42095 (served May 19, 2008) at 11 (rejecting unreasonable practice challenge to a volume cap as "essentially a challenge to a higher rate for service over a certain volume level").

4. *The Tariff Provisions Do Not Reflect UP's Exercise of Undue "Bargaining Power."*

Some shippers argue that the tariff provisions result from unequal bargaining positions, with UP exercising undue power. This argument is upside down. With TIH, the shipper always has the upper hand. The tariff provisions actually reflect UP's reaction to the government-supported power held by shippers. As shippers recognize, UP would prefer not to carry TIH, although we accept that in many instances (but not all) rail transportation is the safest mode for TIH movements.[40] Due to the common carrier obligation, however, shippers are in a position to demand that UP carry their TIH shipments, in volumes chosen by shippers and between origins and destinations directed by shippers, regardless of the risks they created.

Because the indemnity requirement at issue is part of a tariff, shippers describe it as a "take it or leave it" term. That is a misnomer. UP prefers to negotiate contracts to govern TIH carriage. It issues a tariff rate only as a last resort, when the shipper demands it. The great majority of TIH shippers negotiate contracts with UP, and there is significant give and take during those negotiations. As described in the Verified Statement of Diane Duren, submitted with UP's opening evidence, most TIH shippers that have negotiated contracts with UP in the past few years have accepted indemnity requirements that are substantially the same as those included in the tariff provisions. (Duren V.S. at 8-9.) In several circumstances, shippers have

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[40] Barge may be a safer mode of transportation for TIH in some instances. *See* Lewis M. Branscomb et al., Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality, Belfer Center for Science and International Affairs, Harvard Kennedy School, Discussion Paper 2010-01, p. 11 (2010) ("The other safe and practical mode for long-distance transportation of chlorine is by barge, which is indeed considered to be safer than rail but is less available."). In addition, when TIH production is co-located near a TIH end user, there are safer alternatives. Where TIH is moved only a short distance, a pipeline or truck movement in a controlled environment can be a safe way to handle these materials. The tariff provisions give shippers and their customers greater incentives to co-locate their facilities, thereby minimizing the transportation distance and reducing the risk.

sought and obtained modifications to the standard tariff language. (*Id.* at 8.) The only thing that is truly "take it or leave it" about the transportation of TIH is that UP has no choice but to take it.

There is also another perspective to consider. If the Board were to conclude that the tariff provisions were unreasonable, UP might never be able to obtain the protection it seeks through the indemnity requirement. Shippers are not required to enter into contracts to transport their TIH. Thus, if UP could not include the indemnity requirement in the tariff, shippers could force UP to bear the entire burden of losses that are not caused by either UP or shipper negligence, simply by requesting common carriage and bypassing any agreement for a contractual indemnity. The result would be that UP would have no way to protect itself from some of the potentially staggering liability associated with TIH shipments. It could not decline to carry TIH materials or restrict the origins and destinations of such movements, it could not adjust its rates to ensure that it could cover the costs of liability associated with TIH shipments, and it could not establish tariff terms that would limit its liability for losses not attributable to any negligence of its own. That result would be truly unfair and contrary to the public interest.

VI. THE SHIPPERS' "PUBLIC POLICY" ARGUMENTS LACK MERIT.

Some of the shippers offer "public policy" arguments in opposition to the tariff provisions. These arguments, too, are not persuasive.

1. *The Tariff Provisions Promote Safety.*

Some shippers suggest that the tariff provisions could reduce safety by removing incentives for UP to take precautions. For reasons explained in UP's opening evidence, this is not the case. (UP Op. at 22-23.) Because UP has strong economic and operational incentives to avoid accidents regardless of the tariff provisions, it will continue to do everything reasonably possible to maximize the safe transportation of TIH. UP remains subject to a myriad of federal safety regulations, and it has developed its own rules to ensure safe transportation of TIH.

Importantly, UP continues to be liable for any negligence of its own under the tariff provisions, and it will always be the most visible potential defendant if an accident occurs during transportation. But there are unique risks inherent in the transportation of TIH that UP cannot control, due to the inherent nature of these materials. These risks are the result of decisions by TIH shippers and their customers to ship TIH.

No one disputes that UP and shippers both take care with TIH materials. But, as several statements in the shipper comments illustrate, some shippers do not fully appreciate the significance of their role in reducing rail transportation risks.[41] The shippers fail even to mention their ability to influence TIH risk by their decisions whether to ship TIH, how much to ship, and where and when to ship it. As discussed above, the shipper creates the basic risk by placing TIH materials on UP's system and largely determines the length of time that risk will continue. In its opening statement, CF Industries poses the hypothetical of "a shipper [that] delivers TIH product to a railroad, and then a hurricane forms and heads for the rail yard." (CF Industries Op. at 6.) But it was the hypothetical shipper's decision to ship the TIH in the first instance that introduced the hazard. Had the hypothetical shipper not chosen to ship TIH, the risk CF Industries describes would not exist at all.[42] By allocating more of the risks arising from the transportation of TIH to

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[41] *See, e.g.,* CF Industries Op. at 6 ("[O]nce TIH shippers deliver their goods to the railroads, the TIH shippers lose all control over the goods. It is the railroad, and the railroad alone, that controls the safe transportation and delivery of TIH."); Canexus Op. at 3 ("Railways have exclusive control over TIH commodities when those products are being transported by them"); Dyno Nobel Op., Verified Statement of Sandy Rudolph at 6 ("DNI has no control over UP or its operations on UP's private railroad system, or in choosing the routes, the means, or the people that are used in transporting DNI's commodities and products shipped by rail. The railroads have exclusive control over their systems, over the trains and railcars moving in railroad service, and over rail system safety compliance matters.").

[42] UP has established a protocol to avoid risk when a hurricane threat exists. When it becomes aware of such a threat, UP will temporarily refuse to accept new carloads and will move all TIH carloads in its yards in the affected area beyond the reach of the hurricane. Further, UP (continued...)

shippers, the indemnity requirement will give shippers increased incentives to reduce unnecessary transportation of TIH by developing safer forms of current materials, identifying and promoting substitutes that can be used for the same purposes, and developing options to produce TIH materials at manufacturing plants located closer to end-user facilities or to engage in product swaps with other producers located closer to the end user.

As noted above and in UP's opening evidence, in addition to making the basic decision to ship TIH materials on UP, shippers make important decisions that affect the safety of TIH traffic while it moves over the railroad, through their tank car purchasing decisions, their tank car inspection and maintenance processes, their care in loading and securing their shipments, the product and emergency response information they provide when they release the car to the railroad, and their degree of participation with UP in responding to any release (or potential release) of their TIH materials.[43]

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embargoes inbound loads and empties likely to contain TIH residue, holding them outside the danger zone until it is safe to resume movement of these cars to their destinations.

[43] Shippers' maintenance of their tank cars and the degree of care exercised by the shipper or receiver in loading or unloading the cars are particularly important factors. Indeed, there are many incidents involving releases of TIH materials while a tank car sits in a rail yard, and responsibility often lies with the shipper (or its customer). *See* The Pipeline and Hazardous Materials Safety Administration Incident Database, *available at* http://www.phmsa.dot.gov/hazmat/library/data-stats/incidents. For example, the database lists the following incidents involving TIH:

- Indiana Harbor Belt Railroad identified a leak of anhydrous ammonia on a tank car supplied by Transammonia (and shipped by Van Wert Terminal LLC) while the tank was located at a rail yard in Riverdale, Illinois. Faulty O-rings caused the leak. The incident caused approximately $18,000 in damages and response costs. Hazardous Materials Incident Report ID 1-2010120233 (Nov. 11, 2010).
- UP identified a tank car shipped by Dow Chemical Company containing chlorine that leaked in Deming, New Mexico. A loose plug in the liquid valve on the A-end of the car caused the primary leak. There was an additional leak between the manway nozzle and pressure plate. The incident caused approximately $150,000 in total damages and

(continued...)

The real "moral hazard" here is the one that results from the fact that, if shippers bear no liability beyond loss due to their own negligence, they will tend to be less concerned about reducing risks when they decide whether and how to ship TIH via rail. As Professor Shavell explained in his statement submitted with UP's opening evidence, the tariff provisions will help to ensure that shippers and their customers consider the risks when requesting transportation, resulting in a socially beneficial amount of TIH transportation. To produce the socially desirable level of shipping activity (*i.e.*, a level that accurately reflects the risks of moving TIH by rail), shippers must face liability-related incentives to take the risks of rail transport of TIH into account. TIH shippers are in the best position to ensure that costs of TIH transportation are reflected in the price of TIH products. If shippers bear more of the risks associated with transporting TIH, they and their customers will set market prices to end users that factor in those risks. Every decision by shippers and their customers that reduces the volume and distance of TIH transportation reduces the risk for the nation, its cities and towns, first-responders, and railroads and their employees. Thus, the risk allocation provided by the

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response costs. Hazardous Materials Incident Report ID No. X-2009040023 (Mar. 9, 2009).

- A residue tank car of chlorine shipped by Great Lakes Chemical Corporation leaked at the CSX Queensgate Yard in Cincinnati, Ohio. The leak was caused by a loose A-end liquid line closure plug and a valve that was not fully closed. The leak caused over $11,500 in total damages and response costs. Hazardous Materials Incident Report ID No. X-2008100175 (Oct. 8, 2008).
- A residue tank car of chlorine shipped by Brenntag Mid-South Inc. leaked at the CSX rail yard in Russell, Kentucky. The leak was caused by four loose plug valves located in the top protective housing area of the rail car. The leak caused approximately $20,000 in total damages and response costs, and CSXT had to evacuate the area. Hazardous Materials Incident Report ID No. X-2008100060 (Sept. 26, 2008).

tariff provisions will produce a more socially desirable level of TIH shipping activity. (UP Op., Shavell V.S. at 11-15.)

2. *Shippers Ignore the Importance of Rail Transportation and Railroad Viability.*

A number of shippers stress the importance of TIH commodities to the U.S. economy and to public health. (Interested Parties Op. at 11; Canexus Op. at 5; CF Industries Op. at 14; Occidental Chemical Op. at 2; Olin Op. at 5; Opening Comments of U.S. Magnesium, L.L.C. ("U.S. Magnesium Op.") at 1.) No one disputes the importance of TIH for some purposes, but the viability of railroads and their significance for the national economy are important as well. Railroads are key to our nation's economic growth because they serve nearly every agricultural, industrial, wholesale, retail, and resource-based sector of the economy. Railroads generate nearly $265 billion in total annual economic activity and support more than one million jobs directly or indirectly.[44] In addition to promoting economic growth and job creation, railroads deliver commodities that Americans depend on, such as perishable products, grain, coal, automobiles, and other consumer goods.

Out of all the commodities that UP hauls on its system, TIH commodities represent a tiny portion of UP's traffic volume.[45] Despite this small volume, a TIH release under the worst conditions could have significant adverse effects on UP's operations and financial condition or even bankrupt the company. The effects could undermine UP's ability to haul other commodities that are equally vital to the U.S. economy and to public health. Sound public

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[44] Association of American Railroads, *An Overview of America's Freight Railroads* (Oct. 2011). The background paper is available at http://www.aar.org/KeyIssues/Background-Papers.aspx.

[45] In 2011, TIH commodities represented only 0.3% of UP's revenue carloads. (Duren V.S. at 1 (27,600 TIH carloads)); Union Pacific Corporation, 2011 Annual Report (Form 10-K), at 26 (Feb. 3, 2012) (9,072,000 total carloads).

policy should consider the broad consequences of loss resulting from a TIH release, including the impacts of a TIH release on UP's ability to transport products other than TIH.

3. *"Slippery Slope" Speculation Is Baseless.*

Some shippers make a "slippery slope" argument, arguing that railroads will use these or other tariff provisions to cut off TIH shippers, *e.g.*, by demanding that shippers acquire excessive insurance coverage. (Interested Parties Op. at 10; Olin Op. at 20.) This is incorrect. UP recognizes and accepts its common carrier obligation to transport TIH materials. But fulfilling this obligation should not require UP to bear the risks associated with TIH beyond those risks attributable to any negligence of its own. UP is committed to working with its customers to control the risks. Rather than making TIH prohibitively expensive to ship, UP will work with shippers to continue to improve safety and security processes, instituting procedures to ensure that shippers comply with those processes, and encouraging shippers to eliminate unnecessary movements of TIH. Moreover, the Board would have jurisdiction to consider any complaint by shippers related to the impact of insurance requirements included in a common carrier rate, just as it has jurisdiction over the tariff provisions at issue here.

The indemnity provisions allocate more liabilities to shippers not to discourage TIH transportation, but because shippers are in the best position to balance the costs and benefits of transporting TIH and to spread those costs among the end users of TIH. The indemnity requirement promotes safety by creating incentives for shippers to limit public exposure to these dangerous products. UP remains committed to carrying TIH materials and is constantly seeking ways to provide ever safer transportation of TIH. But it wants to be sure shippers and end users fully consider the true costs of this transportation before requiring UP to transport their TIH.

4. *The Tariff Provisions Will Not Force TIH onto Trucks.*

Some shippers point out that rail provides the safest transportation alternative for TIH (at least in some situations).[46] They suggest that the tariff provisions will force TIH onto trucks. But the shippers would be the ones making the decision to ship by truck, and presumably they would not choose more dangerous transportation alternatives. In any event, as discussed above, truck companies that are willing to handle TIH typically use indemnity language similar to (or more restrictive than) UP's tariff provisions; others refuse to ship TIH altogether. (*See* p. 20, *supra*.) Accordingly, TIH shippers likely will be unable to avoid the obligation to indemnify the carrier by switching from UP to truck. Moreover, if the tariff provisions lead to a decrease in TIH shipments via rail, this will not necessarily lead to an increase in truck movements of TIH. For example, if shippers and their customers develop substitute products or processes, rail and truck shipments of TIH will both fall.[47] Thus, fewer rail shipments of TIH could mean fewer truck shipments and less risk for all.

5. *The Tariff Provisions Do Not Violate Federal Law.*

Finally, contrary to the claim of CF Industries (CF Industries Op. at 2-3), 49 U.S.C. § 20106 does not reflect a federal policy against indemnity agreements. Section 20106 states that there will be no federal preemption of state law when the plaintiff seeks damages for personal injury, death, or property damages where a railroad has failed to comply with federal

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[46] *See, e.g.*, CF Industries Op. at 14 ("[R]ail transportation is the most efficient and safest way to transport TIH.") In fact, in some cases it will be safer to transport TIH by pipeline or barge. *See* note 40, *supra*. CF Industries has many barge and pipeline options, as its website explains. *See* http://www.cfindustries.com/plants_overview.html ("[CF Industries] distributes products through one of the industry's largest networks of terminals and warehouses, many of them in Midwestern states with excellent access to rail, water, and pipeline transport.").

[47] In some cases, such as anhydrous ammonia used to fertilize fields, truck shipments typically follow rail shipments.

standards, its own safety standards, or state laws that do not conflict with federal regulations. Thus, Section 20106 preserves certain state law causes of action for an injured party. *See* p. 8 *supra*.; *see also Balistrieri v. Express Drug Screening, LLC*, No. 04-0989, 2008 WL 906236, at *8 (E.D. Wis. 2008). It says nothing about how the railroad and its shipper may allocate liability between themselves. The tariff provisions do not affect the rights of injured parties or circumvent state tort law any more than any other indemnity provision. Rather, they specify who should ultimately pay claims, including those permitted under Section 20106, should they arise.

VII. THE RECORD SUPPORTS THE CONCLUSION THAT THE TARIFF PROVISIONS ARE REASONABLE.

The record established in the opening round of evidence and argument supports the conclusion that the tariff provisions are reasonable. In its opening submission, UP presented substantial evidence showing that the provisions respond to a real problem, *i.e.*, the significant risks that UP faces in connection with its carriage of TIH materials. As discussed above, the shippers (which submitted argument, but little evidence) have not shown otherwise.

UP also showed that the tariff provisions constitute a sensible response to this concern. The provisions help both UP and shippers by clarifying the allocation of liability for losses associated with TIH transportation. It is certainly reasonable for UP and the shipper each to bear the liability resulting from its own negligence. In view of the facts that the shipper makes the decision that puts TIH materials on the railroad, thereby creating the risk inherent in movement of these materials, and that UP has no choice in the matter, it is reasonable to require the shipper to cover losses associated with that transportation that are not due to UP fault. This is an appropriate accommodation between UP's need for protection from liability and the shipper's service needs. The shippers have not shown that this resolution of UP's and the shippers' interests is unreasonable.

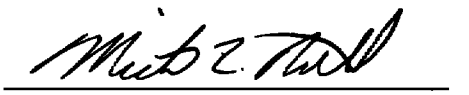
In addition, UP demonstrated that the tariff provisions are consistent with the national rail policy. The provisions promote safety by ensuring that all costs of TIH transportation are reflected in the price paid by end users, thereby giving shippers and their customers incentives to request a socially desirable amount of TIH transportation. *See* 49 U.S.C. § 10101(8) ("operate transportation facilities and equipment without detriment to the public health and safety"); *id.* § 10101(11) ("to encourage . . . safe and suitable working conditions in the railroad industry"). By giving shippers a greater stake in preventing TIH accidents, the provisions create added incentives for shippers to take steps to reduce TIH risks and to partner with UP in efforts to reduce such risks, without significantly diminishing UP's safety incentives. And by shifting some of the liability to TIH shippers, the provisions help to avoid cross-subsidy of TIH transportation by the rest of UP's customers. *See* 49 U.S.C. § 10101(1) ("allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"); *id.* § 10101(5) ("foster sound economic conditions in transportation"); *id.* § 10101(10) ("require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability"); *N Am. Freight Car Ass'n v. BNSF Ry.*, NOR 42060 (Sub-No. 1) (STB served Jan. 26, 2007), at 6, *pet. for review denied, N. Am. Freight Car Ass'n v. STB*, 529 F.3d 1166, 1171-72 (D.C. Cir. 2008) (national rail policy encompasses interest in avoiding cross-subsidies).

None of the shippers' filings even addresses the national rail policy, much less counters UP's showing on these points. On this record, the Board should conclude that the tariff provisions are both reasonable and fully consistent with the national rail policy.

VIII. CONCLUSION

For the reasons discussed above and in UP's opening argument and evidence, the Board should conclude that the tariff provisions at issue in this proceeding are reasonable. The Board should declare that UP may reasonably require, as a condition of providing common carrier service for TIH, that the TIH shipper accept responsibility for liabilities as set forth in Items 50 and 60 of Tariff 6607.

Respectfully submitted,



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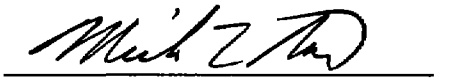
Jones Day
717 Texas Street, Suite 3300
Houston, Texas 77002
Phone: (832) 239-3713

Attorneys for Union Pacific Railroad Company

March 12, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2012, I caused a copy of the foregoing Reply Argument and Evidence of Union Pacific Railroad Company to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in this proceeding.



Michael L. Rosenthal

Additional Examples of Situations in Which UP Could Be Charged with Losses Beyond Its Level of Fault or on a Strict Liability Basis

- Arkansas law provides that an uncollectible share can be reallocated among the solvent tortfeasors. ARK. CODE ANN. §§ 16-55-203(3)(4)(5).

- In California, joint and several liability remains for "economic damages" for "personal injury, property damage, or wrongful death[.]" CAL. CIV. CODE § 1431.2(a). The statute defines "economic damages" as "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." CAL. CIV. CODE § 1431.2(b)(1).

- Minnesota retains joint and several liability for damages arising out of water pollution control, environmental response and liability, public nuisance law for damage to the environment or the public health, and any other environmental or public health law. MINN. STAT. § 604.02, subd. 1(4). In addition, Minnesota provides for the reallocation of uncollectible damages. MINN. STAT. § 604.02, subd. 2.

- Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA) provides for joint and several liability "for a release or threatened release of a hazardous or deleterious substance[.]". Apportionment of liability is not a defense. *See State ex rel. Dep't of Envtl. Quality v. BNSF Ry.*, 246 P.3d 1037 (Mont. 2010).

- Nebraska allows for joint and several liability for economic damages. NEB. REV. STAT. § 25-21, 185.10.

- Under Nevada law, joint and several liability is retained for "[t]he emission, disposal or spillage of a toxic or hazardous substance." NEV. REV. STAT. § 41.141(5)(c).

- New Mexico recognizes an exception to proportionate liability and applies joint and several liability to situations "having a sound basis in public policy." N.M. STAT. ANN. § 41-3A-1(C)(4).

- Oklahoma imposes joint and several liability where the plaintiff is not negligent. In addition, joint and several liability applies where the jury is not able to apportion damages. *Boyles v. Okla. Natural Gas Co.*, 619 P.2d 613, 616-17 (Okla. 1980) (court approved joint and several liability in a contamination case).

- Oregon allows for the reallocation of damages in the case of uncollectibility. The uncollectible portion is subject to joint liability if (i) the defendant's fault is greater than plaintiff's and (ii) the defendant is greater than 25% at fault. OR. REV. STAT. § 31.610(4). Thus, if a Plaintiff is not at fault, UP is 30% at fault, Shipper is 10% at fault, and a third party is 60% at fault, UP could be jointly liable if the third party's 60% of damages is not collectible. For example, if total damages are $1 million, Plaintiff would collect $900,000 from UP under the above allocations, where the third party is judgment proof. Item 60 of the

tariff allows UP to be indemnified by the shipper for the $600,000 in liability not caused by the railroad.

- Oregon's proportionate liability statute, which provides that liability "shall be several only and shall not be joint" OR. REV. STAT. § 31.610(1), does not apply to "[a] civil action resulting from the violation of a standard established by Oregon or federal statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in ORS 466.005, hazardous substance, as defined in ORS 453.005 or radioactive waste, as defined in ORS 469.300." OR. REV. STAT. § 31.610(6)(a).

- Utah provides for a reallocation of liability where fault is attributed to an immune party. Utah Code Ann. § 78B-5-818(4)(a). If the fault of all immune parties is less than 40%, the fault of the immune party or parties is reduced to zero, and 100% of the fault is reallocated. Utah Code Ann. § 78B-5-819(2)(a).

- The State of Washington "has abolished joint and several liability for most causes of action in favor of proportionate damages." *Coulter v. Asten Grp., Inc.*, 146 P.3d 444, 446-47 (Wash. 2006). However, "RCW 4.22.070(3)(a) excludes entirely from the general rule of proportionate damages '*any cause of action relating to hazardous wastes or substances* or solid waste disposal sites.'" *Id.* (emphasis added, citation omitted). Moreover, joint and several liability still applies where the plaintiff is found to have no fault. WASH. REV. CODE ANN. § 4.22.070(1)(b).

From: MHEMMER@UP.COM [mailto:MHEMMER@UP.COM]
Sent: Tuesday, August 04, 2009 4:20 PM
To: Paul Donovan; aGale@rqn.com; MJohnson@rqn.com
Cc: RKDEAL@UP.COM
Subject: Utah Litigation and UP Tariff

Dear Ms. Gale and Gentlemen:

After consultating with certain TIH customers and reviewing your complaint, Union Pacific decided to make susbstantial changes to the tariff items subject to the litigation. The revised tariff items are attached. We had three goals in making these changes:

First, we wanted to eliminate any tariff language that imposes liability on either customer or railroad for the other's negligence.

Second, we were amused by the complaint's speculation that we consciously set up the STB common-carriage proceeding so that we could use it as a device to transfer liability under the tariff. The idea never crossed our minds. That said, the prior tariff might indeed have been interpreted to have the unintended effect you posited, so we removed that possibility.

Third, we changed and limited the purpose of Item 65-A.

We also wanted to simplify the tariff language to make it easier to understand.

The revised tariff will be published today, to be effective in 20 days, or earlier on request by a customer. Although we devoted considerable attention to this tariff language and are issuing it today, we are open to comments. While we do not expect you to embrace the tariff, we also do not see any state-law claims remaining against it. Given the significant changes in the tariff, please let us know whether you plan to continue the Utah litigation, which we believe will cost all of our clients unnecessary legal fees and time.

Mike Hemmer

(See attached file: UP 6607.pdf)

J. Michael Hemmer
Sr. Vice President-Law & General Counsel
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1400 Douglas Street, 19th Floor
Omaha, NE 68179
402-544-6677; Fax 402-501-2133
mhemmer@up.com

**

UP 6607	Item: 50-A INDEMNITY

Item 50. Indemnity:

[c]

1. **RAILROAD SHALL SAVE, INDEMNIFY, DEFEND, AND HOLD HARMLESS CUSTOMER AND ITS DIRECTORS, OFFICERS, AGENTS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, LOSSES, DAMAGES (INCLUDING WITHOUT LIMITATION SPECIAL AND CONSEQUENTIAL DAMAGES), COSTS, FINES, PENALTIES, JUDGMENTS, EXPENSES (INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES, COSTS OF COURT AND OTHER LEGAL OR INVESTIGATIVE EXPENSES, CONSULTING FEES, COSTS OF REMEDIATION, AND GOVERNMENT OVERSIGHT COSTS), SUITS, AND CLAIMS OF ENVIRONMENTAL EXPOSURE NATURAL RESOURCE DAMAGES (COLLECTIVELY "LIABILITIES") ARISING FROM RAILROAD'S SOLE NEGLIGENCE OR SOLE FAULT IN THE PERFORMANCE OF TRANSPORTATION SERVICES PURSUANT TO THIS TARIFF. SUCH INDEMNIFICATION, DEFENSE, AND HOLD HARMLESS OBLIGATIONS SHALL NOT APPLY TO ANY LIABILITIES CAUSED BY THE SOLE NEGLIGENCE OR FAULT OF CUSTOMER OR THE CONCURRING NEGLIGENCE OR FAULT OF RAILROAD AND CUSTOMER.**

2. **CUSTOMER SHALL SAVE, INDEMNIFY, DEFEND, AND HOLD HARMLESS RAILROAD AND ITS DIRECTORS, OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL LIABILITIES EXCEPT THOSE CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OR FAULT OF RAILROAD. CUSTOMER INDEMNITY SHALL INCLUDE BUT NOT BE LIMITED TO ANY LIABILITIES ARISING FROM:**
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   CUSTOMER IS SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY, AND HOLD RAILROAD HARMLESS AGAINST ANY LIABILITIES DUE TO THE

PRESENCE OF CHEMICALS OR CONTAMINANTS IN THE COMMODITY WHICH ARE NOT PROPERLY DESCRIBED IN THE COMMODITY SHIPPING DOCUMENT.

UNION PACIFIC	UP 6607	Item: 60-B JOINT LIABILITY

Item 60. Joint Liability:

[c]

TO THE EXTENT THAT ANY LIABILITIES ARE CAUSED BY THE JOINT, CONTRIBUTORY OR CONCURRENT NEGLIGENCE, OR FAULT OF THE RAILROAD AND CUSTOMER, RESPONSIBLITY FOR SUCH LIABILITIES SHALL BE ADJUDICATED UNDER PRICIPLES OF COMPARATIVE FAULT IN WHICH THE TRIER OF FACT SHALL DETERMINE THE PERCENTAGE OF RESPONSIBILITY FOR RAILROAD, CUSTOMER, AND ANY OTHER PARTY WHO IS ALLEGED TO HAVE CAUSED OR TO HAVE CONTRIBUTED TO CAUSING IN ANY WAY SUCH LIABILITES, WHETHER BY NEGLIGENT ACT OR OMISSION, BY ANY DEFECTIVE OR UNREASONABLY DANGEROUS PRODUCT, BY OTHER CONDUCT OR ACTIVITY THAT VIOLATES AN APPLICABLE LEGAL STANDARD, OR BY ANY COMBINATION OF THESE, RAILROAD AND CUSTOMER SHALL EACH BE LIABLE ONLY FOR THE AMOUNT OF SUCH LIABILITIES ALLOCATED TO THAT PARTY IN PROPORTION TO THAT PARTY'S PERCENTAGE OF RESPONSIBILITY.

Paul Donovan
<paul.donovan@LaroeLaw.com>
08/06/2009 02:37 PM

To "MHEMMER@UP.COM" <MHEMMER@UP.COM>
cc
bcc
Subject UP 6607

Mike,

One large member of CI seeing a possible misinterpretation of the language of Item 50.2 would like to revise the language to read:

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[List bullet points but delete the last one reading "any loss caused by the sole negligence or fault of customer"]

All other paragraphs in Item 50 would remain unchanged.

From my perspective since it is merely rearranging words and doing no violence to the substance of your language I cannot object to the change. I realize that it is in an abundance of caution, and I don't think that any reasonable judge could misinterpret the existing language but remember we can't "Mess with Texas"; or any other court for that matter. I hope this won't cause you any problems and I am trying to expedite the dismissal of the case so that we don't have to go back for another extension to answer.

Let me have your reaction, thanks.

Paul

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LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036
Phone: (202) 298-8100
Fax: (202) 298-8200
E-mail: paul donovan@laroelaw.com

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-----Original Message-----
From: MHEMMER@UP.COM [mailto:MHEMMER@UP.COM]
Sent: Wednesday, August 12, 2009 4:51 PM
To: Paul Donovan
Subject: Re: UP 6607 Revision

Paul,

We concluded that the General Counsel of your important customer correctly identified a substantive point and that the change she or he wanted would alter the intent of the revised tariff. Because of the suggested change, we also discovered a potential conflict between that paragraph and the following item, which we modified to ensure consistency.

The issue is responsibility for costs and losses that, although this is perhaps unlikely, do not the result from anyone's negligence. Our intent is for UP to be liable for costs and losses attributable to its negligence, but only to the extent it is negligent. Thus, should an Act of God cause costs and losses, and it is determined that neither party is negligent, the shipper would be responsible because of the nature of the commodity and its effects. Such costs and losses--an example is evacuation costs--are attributable to the product and would not occur for the vast majority of our products. Obviously, in most cases, one or both parties will be found negligent, and liability will follow that finding.

Here is a copy of the revised tariff, which we plan to publish tomorrow so that we can include it in our court filings on Monday and in a settlement offer to U.S. Magnesium. (See attached file: UP 6607 revised 8-12-09.pdf)

We remain open to discussions.

Mike

J. Michael Hemmer
Sr. Vice President-Law & General Counsel
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mhemmer@up.com

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<paul.donovan@LaroeLaw.com>

08/06/2009 02:37 PM

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**

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**

UP 6607	Item: 50-B INDEMNITY

Item 50. Indemnity:

[c]

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UNION PACIFIC	UP 6607	Item: 60-C JOINT LIABILITY

Item 60. Joint Liability:

[c]

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Paul Donovan
<paul.donovan@LaroeLaw.com>

08/12/2009 04:31 PM

To "MHEMMER@UP.COM" <MHEMMER@UP.COM>
cc
bcc
Subject RE: UP 6607 Revision

Mike, I understand your concerns. My hypothetical would be a shipment delivered by UP to a customer of your customer and that receiver failing to secure the valve for the return trip. The car gets half way to destination and leaks. Why should UP have to pay legal fees to defend itself, and it will be sued, when it had no relationship with the negligent party and the shipper did and the shipper had the ability to seek indemnification from that receiver. Remember, the Chlorine Institute is not a private party litigant trying to get every concession from UP. It wants its product handle safely and securely more than you do, if that's possible. I have already indicated to the client that we will not push to the extreme. At the same time, and acknowledging your desire to be held harmless when you did nothing wrong, there are those who think that the language of Item 50 paragraph 2 might be misconstrued by a court and the shipper required to indemnify UP for UP's negligence. I see their point although I do not agree that any sensible court could come to that conclusion particularly where, as here, the tariff is drafted by UP and any confusion in its language would be construed against your interest. Is there some language that would properly deal with our joint position, i.e., someone other than UP, presumably the shipper, will pay for costs, including legal costs incurred by UP when UP is not held to be solely, or concurrently negligent? Thank you for your attention to this matter.

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E-mail: paul.donovan@laroelaw.com

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Sent: Wednesday, August 12, 2009 4:51 PM
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08/06/2009 02:37 PM

To "MHEMMER@UP.COM" <MHEMMER@UP.COM>

cc

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E-mail: paul.donovan@laroelaw.com

Paul Donovan
<paul.donovan@LaroeLaw.com>
08/13/2009 06:39 AM

To "MHEMMER@UP.COM" <MHEMMER@UP.COM>
cc
bcc
Subject **RE: UP 6607 Revision**

I think I have a simple fix. First, the concern is that while your language in the first sentence of paragraph 2 of item 50 is clear, it is confused by the language of the third bullet stating that customer must indemnify for "release, unloading, transfer, delivery...." Someone could read that as superseding the language of the first sentence. Let me suggest that we simply add language so that the third bullet reads "RELEASE, UNLOADING, TRANSFER, DELIVERY, TREATMENT, DUMPING, STORAGE, OR DISPOSAL OF COMMODITY NOT CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OR FAULT OF RAILROAD." With that addition I have authority to dismiss the case ASAP.

P.S. I won't argue the issue but I don't see how costs, other than attorneys fees and defense costs can be levied against UP unless UP is held negligent. But we will let some other lawyers debate that one, if necessary.

Thanks again for your efforts,
Paul

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From: MHEMMER@UP.COM [mailto:MHEMMER@UP.COM]
Sent: Wednesday, August 12, 2009 5:46 PM
To: Paul Donovan
Subject: Re: UP 6607 Revision

Can you explain how the tariff item could be read to require indemnification for UP's negligence? We are perhaps too close to the language to see the point that you can see.

----- Original Message -----
From: Paul Donovan [paul.donovan@LaroeLaw.com]
Sent: 08/12/2009 05:31 PM AST
To: Mike Hemmer

Subject: RE: UP 6607 Revision

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Paul,

We concluded that the General Counsel of your important customer correctly identified a substantive point and that the change she or he wanted would alter the intent of the revised tariff. Because of the suggested change, we also discovered a potential conflict between that paragraph and the following item, which we modified to ensure consistency.

The issue is responsibility for costs and losses that, although this is perhaps unlikely, do not the result from anyone's negligence. Our

intent is for UP to be liable for costs and losses attributable to its negligence, but only to the extent it is negligent. Thus, should an Act of God cause costs and losses, and it is determined that neither party is negligent, the shipper would be responsible because of the nature of the commodity and its effects. Such costs and losses--an example is evacuation costs--are attributable to the product and would not occur for the vast majority of our products. Obviously, in most cases, one or both parties will be found negligent, and liability will follow that finding.

Here is a copy of the revised tariff, which we plan to publish tomorrow so that we can include it in our court filings on Monday and in a settlement offer to U.S. Magnesium. (See attached file: UP 6607 revised 8-12-09.pdf)

We remain open to discussions.

Mike

J. Michael Hemmer
Sr. Vice President-Law & General Counsel
Union Pacific Corporation/Union Pacific R.R.
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Omaha, NE 68179
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mhemmer@up.com

Paul Donovan
<paul.donovan@LaroeLaw.com>
08/06/2009 02:37 PM

To "MHEMMER@UP.COM" <MHEMMER@UP.COM>
cc
Subject UP 6607

Mike,

One large member of CI seeing a possible misinterpretation of the language of Item 50.2 would like to revise the language to read:

CUSTOMER SHALL SAVE, INDEMNIFY, DEFEND, AND HOLD HARMLESS RAILROAD AND ITS DIRECTORS, OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL LIABILITIES EXCEPT THOSE CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OR FAULT OF RAIROAD AND ARISING FROM CUSTOMER'S SOLE NEGLIGENCE OR FAULT INCLUDING BUT NOT LIMITED TO ANY LIABILITY ARISING FROM:

[List bullet points but delete the last one reading "any loss caused by the sole negligence or fault of customer"]

All other paragraphs in Item 50 would remain unchanged.

From my perspective since it is merely rearranging words and doing no violence to the substance of your language I cannot object to the change. I realize that it is in an abundance of caution, and I don't think that any reasonable judge could misinterpret the existing language but remember we can't "Mess with Texas"; or any other court for that matter. I hope this won't cause you any problems and I am trying to expedite the dismissal of the case so that we don't have to go back for another extension to answer.

Let me have your reaction, thanks.

Paul

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER

REPLY VERIFIED STATEMENT OF
WARREN B. BEACH

My name is Warren B. Beach. I am Assistant Vice President for Finance and Insurance of Union Pacific Railroad Company (UP) and Assistant Vice President for Finance and Insurance of Union Pacific Corporation, UP's holding company. I have been employed by UP since July 1986 and have held my current position with UP since February 2001. I am responsible for all of UP's non-benefit related insurance programs, including liability and property insurance. In 2008 I provided a verified statement in Ex Parte No. 677 (Sub-No. 1) in response to requests by Board members for additional information on railroad liability insurance and toxic by inhalation (TIH) chemicals. A copy of that verified statement is included as Attachment A to this declaration. I incorporate my 2008 statement by reference here and refer to it below.

As discussed in my 2008 statement, UP obtains commercial liability insurance through a captive insurer and through a number of reinsurance companies. UP is self insured to $25 million. In other words, for each occurrence, UP's commercial liability insurance does not cover losses of $25 million or less, and does not cover the first $25 million of a loss that exceeds this amount. This level of self-insurance is imposed on UP by the insurance market place.

Beyond this self-insured retention, UP purchases commercial insurance coverage. UP had commercial liability insurance totaling $1 billion as of 2008, when I provided my earlier verified statement. The amount and cost of liability insurance coverage available to UP change over time depending on market conditions and UP's loss experience (and the loss experience of the rail industry as a whole). In general, however, the maximum coverage available to UP (at reasonable cost) in the market is in the range of $1 billion. In 2012 UP was able to purchase $1.2 billion of commercial liability insurance.

We continue to consider coverage in this range to fall far short of what we need to cover our potential exposure, particularly for TIH incidents. As I explained in my 2008 statement, the potential loss from a single terrorist attack involving release of hazardous materials in a heavily populated area can reach hundreds of billions of dollars. Thus, even if UP could double or triple its coverage, it would not come close to covering the potential loss for a truly catastrophic event.

UP's liability insurance also falls short of covering UP's potential loss for smaller TIH accidents. Because UP self insures for losses up to $25 million, UP will not recover anything under its commercial insurance policies if an accident generates losses below that amount, or if there are several accidents in a year, each below the retention amount. If an accident results in losses above the self-insured retention level, commercial insurance will cover that higher layer of losses (up to the policy limits), after UP covers the first $25 million. However, any insurance payment for the first incident in a coverage year will reduce the amount of coverage available to UP for the remainder of the year. For example, if UP purchases an initial layer of coverage in the amount of $100 million above its self-insured retention, and it experiences its first loss during the policy year from a TIH accident in the amount of $50 million,

UP will pay the first $25 million of that loss itself (the self-insured retention) and will receive $25 million from the first layer insurer. If UP then experiences a second $50 million loss during the same policy year, it will pay the full amount of the loss -- its $25 million self-insured retention plus $25 million beyond that (because that portion of the first layer of coverage was used up when the insurer paid on the first loss).

In addition, one or more TIH accidents will change UP's risk profile. Insurers may respond to an accident by raising UP's premiums for the same amount of coverage or by restricting the availability of coverage. A TIH accident could also lead insurers to return UP's premiums and revoke its coverage in the middle of the policy year, leaving UP without coverage and scrambling to locate new coverage in the middle of the year, almost certainly at a higher price. Even if UP itself has no significant losses due to TIH accidents, a major TIH accident involving another rail carrier could cause insurers to raise premiums or restrict coverage for UP, based on their reassessment of the risks involved with rail transportation.

I understand that Olin Corporation has suggested that it would be willing to pay the portion of UP's insurance premiums attributable to Olin's TIH shipments. Of course, this offer would not help with losses UP must cover on its own due to its self-insured retention. Moreover, it is not practical to attempt to identify a share of UP's premiums attributable to Olin's TIH shipments. UP acquires liability insurance to cover all of its operations. Neither the coverage nor the premiums are broken down by commodity, much less by individual shipper. Thus, UP could not calculate precisely which part of its premiums is attributable to Olin's shipments.

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

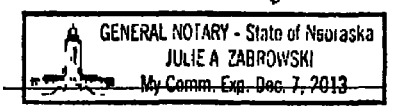
Warren B. Beach, Vice President for Finance and Insurance, being first duly sworn, deposes and states that he has read the foregoing Verified Statement, knows the facts contained therein, and that the same are true as stated to the best of his knowledge, information, and belief.

Warren B. Beach

Subscribed and sworn to before me this 9th day of March, 2012.

Notary Public

My Commission Expires:



REDACTED - TO BE PLACED ON PUBLIC FILE

VERIFIED STATEMENT
OF
WARREN B. BEACH

My name is Warren B. Beach. I am Assistant Vice President for Finance and Insurance for Union Pacific Railroad Company (UP) and Assistant Treasurer of Union Pacific Corporation, UP's holding company. My business address is 1400 Douglas Street, STOP 1920, Omaha, Nebraska, 68179-1920. I have been employed by Union Pacific since July, 1986 and have held my present position since February, 2001. I am responsible for all of UP's non-benefit related insurance programs, including liability and property. I am providing this statement in response to requests by Board members at the July 22 hearing in Ex Parte No. 677 (Sub-No. 1) for additional information on railroad liability insurance and toxic by inhalation (TIH) chemicals.

First of all, some background on railroad liability insurance may be useful. UP purchases all of its liability insurance from Wasatch Insurance, a wholly owned, Bermuda-domiciled captive insurer. A captive insurer is a legally recognized insurance company whose sole purpose is to provide insurance to its parent corporation (UP, in this case). For the record, there is no tax advantage to UP to use a captive. We have taken the election offered in Section 953d of the Internal Revenue Code to have our offshore captive taxed as a domestic US corporation.

The reason we use a foreign, captive insurer is that it provides access to global reinsurance markets. Most of the big U S. domestic insurance companies are focused on business lines such as life, homeowners, auto, and small to midsize business insurance. They have no interest in Class I railroads and will not insure them. So we have to look outside the U.S. at the largely unregulated reinsurance markets.

Reinsurers are companies that insure insurance companies. Insurance companies need to spread the risks of big events like major hurricanes in Florida. One way they do that is by purchasing reinsurance.. insurance for insurance companies... to help them pay claims when a really big loss happens. Having our own "captive" insurance company gives us access to the global reinsurance market. Wasatch Insures Union Pacific. Reinsurers Insure Wasatch. Wasatch is the conduit between UP and the reinsurance market.

Most of the big reinsurance companies are located overseas, and the global reinsurance market for U.S. railroads is relatively small. I do not know of any reinsurance markets in Asia, the Mid East, Africa, Australia or South America that are interested in North American Class I railroads. With one notable exception, North American (U.S. & Canada) carriers are not interested in the U S. rail market. That leaves Western Europe (primarily England, Ireland, France, Germany, Switzerland) and Bermuda.

Reinsurance companies provide a hierarchy of coverage - that is, no one company provides UP's total coverage. A typical reinsurer will issue one policy from about $50 million to $100 million. In today's market a buyer must purchase 10 to 20 individual policies (from 10 to 20 different reinsurance companies) in order to have an aggregate of $1 billion of coverage. The policies are arranged in a very strict hierarchy that defines the order in which each policy will respond to a loss. The first policy (the policy most at risk) costs significantly more than the last policy (or the policy least at risk).

$100 million dollars is a lot of money. It is a huge financial commitment, even for a large global reinsurance company. The process of purchasing even a single $100 million dollar policy requires intense, personal, executive-level negotiations on both sides of the table. Both sides come equipped with reports from actuaries, attorneys, brokers, adjusters, underwriters, and more. No insurance executive makes a commitment of this size without a great deal of thought.

UP is self insured to $25 million. In other words, UP's commercial liability insurance does not cover losses of $25 million or less, and does not cover the first $25 million of a loss that exceeds this amount. Our self insured retention has more than doubled in recent years because of industry losses

Beyond this, UP currently (2008) has commercial liability insurance totaling $1 billion. This represents the total coverage offered by a hierarchy of reinsurance policies purchased from 17 different reinsurers. The individual policies range in size from $2.5 million to $150 million. One third of the dollar coverage was provided by six very large reinsurers in Europe. Two thirds of the dollar coverage was provided by 10 reinsurers in Bermuda. There is only one U.S. reinsurer on our account.

The cost of these policies for 2008 was $ million. This represents an increase on a compound annual basis of 18% per year from the amount we paid for similar coverage in 2000 ($ million). I understand the Board members were also interested in the amount of premiums paid for TIH incident coverage as compared to coverage for other incidents. Our policies do not separately break out TIH incident coverage (or the premiums for that coverage), so it is not possible to give a definite number.

Based on my many years of experience dealing with railroad insurance, the $1 billion in commercial insurance coverage we obtained for 2008 was about the maximum coverage available to us in the market.[1] We consider $1 billion to be insufficient to cover our potential exposure, particularly for TIH incidents.

[1] Insurance markets are subject to short term fluctuations, so the maximum coverage available on any given date may be slightly higher or lower than this amount.

In the past, there were other domestic and international reinsurers who were willing to participate in railroad insurance, and the potential limits were as high as $1.5 billion. That, however, is no longer the case. Many insurance and reinsurance companies have been adversely affected in recent years. Terrorism, global recession, the sub-prime mortgage debacle, and catastrophic claims from natural disasters have all contributed to shrinking markets. In addition, hazardous material releases in Graniteville, South Carolina, Minot, North Dakota, and Eunice, Louisiana, together with terrorist bombings of passenger rail facilities in London and Madrid, have all driven insurers and reinsurers from the rail liability market. If there are additional large claims, my prediction is that the reinsurance market will contract even more, further reducing capacity and increasing costs for obtaining the insurance that is available. In fact, we are concerned that the market may shrink next year due to the Graniteville claims

The issue this presents for UP is that a TIH incident has the potential to cost many billions of dollars, and there is no insurance available that provides coverage commensurate with the risk. To give an idea of the exposure we could be facing, in 2006, the American Academy of Actuaries (AAA) prepared estimates of the costs of various terrorism scenarios for the President's Working Group on Financial Markets. AAA estimated that the losses from a chemical, nuclear or biological release (CNBR) in an urban area could range up to $42 3 billion for an incident in Des Moines, and up to $778.1 billion for incident an in

New York City. [2] Obviously, our insurance does not even come close to covering losses of these magnitudes.

This situation is analogous to rail transportation of spent nuclear fuel, another commodity which, if involved in a major release, could result in damages that far exceed available commercial insurance capacity. The difference is that Congress established the Price-Anderson Act as a way of mitigating the huge risks involved in the use and handling of nuclear materials. As a result, UP does not face "bet the company" exposure whenever it transports a load of spent nuclear fuel.

In summary:

1. The worldwide reinsurance capacity available to UP is limited to about $1 billion, which is the amount UP currently carries.
2. The cost of the available capacity is increasing and deductibles are rising.
3. A major TIH incident could easily result in liability exposure far exceeding $1 billion.
4. We cannot purchase insurance that is commensurate with the risk inherent in transporting TIH.

This is not a sustainable business model for UP.

[2] American Academy of Actuaries Comments to President's Working Group on Financial Markets, April 21, 2006, Appendix II.

DECLARATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief and information.

Executed on August 21, 2008.

Warren B. Beach